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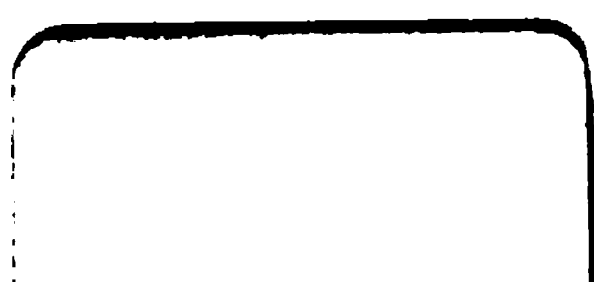
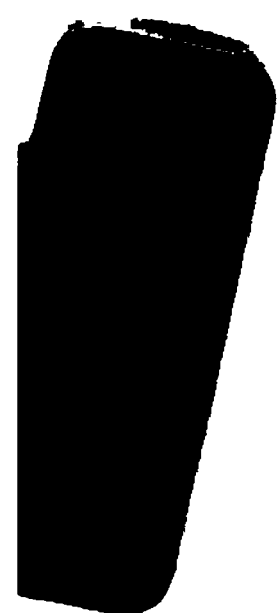
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A TREATISE
ON
THE LAW
OF
EXECUTORS AND ADMINISTRATORS.

BY THE RIGHT HONORABLE
SIR EDWARD VAUGHAN WILLIAMS,
LATE ONE OF THE JUDGES OF HER MAJESTY'S COURT OF COMMON PLEAS.

SEVENTH EDITION.

BY THE RIGHT HONORABLE
SIR EDWARD VAUGHAN WILLIAMS,
AND
WALTER V. VAUGHAN WILLIAMS, ESQ.
OF THE INNER TEMPLE, BARRISTER AT LAW.

SIXTH AMERICAN EDITION,
IN WHICH THE SUBJECT OF WILLS IS PARTICULARLY DISCUSSED AND
ENLARGED UPON.

By J. C. PERKINS, LL. D.

IN THREE VOLUMES.

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* BOOK THE FIFTH.

OF THE STAMP DUTIES ON LEGACIES AND SUCCESSIONS TO PERSONAL ESTATES.

BY the statute 55 Geo. 3, c. 184, the stamp duties imposed on legacies, and successions to personal estate upon intestacies, by the statute of 48 Geo. 3, c. 149, are repealed, and the following other stamp duties are substituted : —

I. *Where the Testator, Testatrix, or Intestate, died before or upon the 5th day of April, 1805.*

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards given by any will or testamentary instrument of any person who died before or upon the 5th day of April, 1805, out of his or her personal or movable estate, and which shall *be paid, delivered, retained, satisfied, or discharged, after the thirty-first day of August, 1815* : (a)

Also for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons) of the personal or movable estate of any person who died before or upon the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy ; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815 :

(a) As to the construction of these words, see the cases collected, *post*, 1612 *et seq.*

* Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a *brother or a sister of the deceased, or any descendant of a brother or sister of the deceased*; a duty at and after the rate of two pounds and ten shillings per centum on the amount or value thereof . . . 2*l.* 10*s.* per cent.

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a *brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased*; a duty at and after the rate of four pounds per centum on the amount or value thereof
4*l.* per cent.

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a *brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased*; a duty at and after the rate of five pounds per centum on the amount or value thereof 5*l.* per cent.

And where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of any person *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased*; (b) a duty at and after the rate of eight pounds per centum on the amount or value thereof 8*l.* per cent.

* II. *Where the Testator, Testatrix, or Intestate, shall have died after the 5th day of April, 1805. (c)*

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument, of any person,

(b) See the Attorney General *v. Bacchus*, *post*, 1618, and the Attorney General *v. Burnie*, *post*, 1618; *Skottime v. Young*, L. R. 11 Eq. Cas. 47.

(c) The distinctions as to the rates of duties in respect of the wills and administrations of persons who died before this date, and those who died after it, appear

to be these, viz, that under the former, personal estate only is liable to duty — the rates of duty to collaterals and strangers are lower than under the latter, — and property passing to lineal ancestors or descendants is liable to no duty at all. Gwynne on Probate and Legacy Duties, p. 59, 2d ed.

who shall have died after the 5th day of April, 1805, either out of his or her personal or movable estate, or out of or charged upon his or her real or heritable estate, or out of any moneys to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st day of August, 1815 :

Also, for the clear residue (when devolving to one person) and for every share of the clear residue (when devolving to two or more persons), of the personal or movable estate, of any person, who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815 :

And also for the clear residue (when given to one person) and for every share of the clear residue (when given to two or more persons) of the moneys to arise from the sale, mortgage, or other disposition, of any real or * heritable estate, directed (*d*) to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument of any person, who shall have died after the 5th day of April, 1805 (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any), where such residue, or share of residue, shall amount to 20*l.* or upwards, and where the same shall be paid, retained, or discharged after the 31st day of August, 1815 :

Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a child of the deceased, or any descendant of a child of the deceased*, or to or for the benefit of *the father or mother, or any lineal ancestor of the deceased*; a duty at and after the rate of one pound per centum on the amount or value thereof 1*l.* per cent.

Where any such legacy, or residue, or any share of such res-

(*d*) As to the construction of this word, see the cases collected, *post*, 1629, 1630.

idue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased*; a duty at and after the rate of three pounds per centum on the amount or value thereof 3*l.* per cent.

Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased*; a duty at and after the rate of five pounds per centum on the amount and value thereof 5*l.* per cent.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of a grandfather * or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased*; a duty at and after the rate of six pounds per centum on the amount or value thereof 6*l.* per cent.

And where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved to or for the benefit of any person *in any other degree of collateral consanguinity to the deceased* than is above described, or to or for the benefit of *any stranger in blood to the deceased*; a duty at and after the rate of ten pounds per centum on the amount or value thereof 10*l.* per cent.

And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.

And where any legatee shall take two or more distinct legacies or benefits under any will or testamentary instrument, which shall together be of the amount or value of 20*l.*, each shall be charged with duty, though each or either may be separately under that amount or value.

EXEMPTIONS.

Legacies, and residues, or shares of residue, of any such estate, or effects as aforesaid, given or devolving, to or for the benefit of the husband or wife (*e*) of the deceased, or to or for the benefit of any of the royal family.

*And all legacies which were exempted from duty by the act passed in the thirty-ninth year of his majesty's reign, c. 73, for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty. (*f*)

By section 8 of the statute, it is provided, that all the powers and provisions, clauses, regulations and directions, fines, forfeitures, pains and penalties, contained in the former acts relating to the repealed duties, shall extend to the duties granted by the present. (*g*) It is therefore necessary to recur to the provisions of the earlier statutes.

Powers and provisions of former acts to extend to 55 Geo. 3, c. 184.

By the statute 20 Geo. 3, c. 28, certain stamp duties were imposed for every receipt or other discharge for any legacy left by any will or other testamentary instrument, or for any share or part of a personal estate divided by force of the statute of distributions, or the custom of any province or place; and by section 3 it was enacted, that no such receipt unstamped should be pleaded or given in evidence in any court.

20 Geo. 3, c. 28.

By the statute 23 Geo. 3, c. 58, additional stamp duties were imposed. And by section 8 it was enacted, that the receipts, &c. should be stamped before written upon.

23 Geo. 3, c. 58.

By the statute 29 Geo. 3, c. 51, additional duties were imposed, which, as well as the duties imposed by the preceding acts, were repealed by the statute 36 Geo. 3, c. 52.

29 Geo. 3, c. 51.

By these statutes, it will be observed, the duties were imposed merely on the *receipts* for legacies and shares of residue. But this mode of imposition was found to be disadvantageous to the

(*e*) A legacy, in order to fall within this exception, must be for the *absolute* benefit of the husband or wife. Therefore bequests by a husband to his wife "for her and her family," or "to maintain her and our children," if they are given so as to create a trust as between the widow and children (see the cases collected, *ante*, 1125, 1126), are liable to the duty in respect of the interests of the children. In *re Harris*, 7 Ex. 344.

(*f*) See *post*, 1636.

(*g*) See this section stated *verbatim*, *ante*, 609.

revenue; inasmuch as, if executors or administrators chose to rely on the good faith of legatees or next of kin, and to run the risk of taking no receipts from them, the duties were altogether evaded. (*h*)

To obviate this, the statute 36 Geo. 3, c. 52, after repealing Stat. 36 Geo. 3, c. 52. * the preceding duties, imposes new ones, not upon the receipts, but upon the legacies and shares of residue themselves. And after enacting, by section 27, that no legacy, &c. shall be paid without a receipt, proceeds, by section 28, to lay a penalty on persons paying or receiving legacies, &c. without receipts stamped in pursuance of the act. But it is provided, by section 41, that the receipt so stamped shall not be required to have a receipt stamp also.

As a due compliance with the provisions of this act of parliament is so necessary for the proper performance of the office of executor or administrator, it is judged expedient to insert in this place, *verbatim*, some of its most material enactments.

By section 6 it is enacted, "That the duties hereby imposed shall, *in all cases in which it is not hereby otherwise provided*, be accounted for, answered, and paid, by the person or persons having or taking the burden of the execution of the will, or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his, her, or their own benefit, or for the benefit of any other person or persons, of any legacy or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he, she, or they shall be entitled so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person or persons; and also upon delivery, payment, or other satisfaction or discharge whatsoever, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person or persons shall be entitled; and in case any person or persons, having or taking the burden of such execution or administration as aforesaid, shall retain for his, her, or their own benefit, or for the benefit of any other person or persons, any legacy, or any part of any legacy, or the residue of any personal estate, or any part of such residue, which such person or persons shall be entitled

Duties to be paid by executors or administrators, on retaining or paying legacies.

If duty be not paid before legacies are retained by executors, or discharged, they having deduct-

(*h*) See *Green v. Croft*, 2 H. Bl. 33, 34; *Hill v. Atkinson*, 2 Meriv. 53.

so to retain, either in his, her, or their own right, or in the right or for the benefit of any other person * or persons, and upon which any duty shall be chargeable by virtue of this act, not having first paid such duty, or shall deliver, pay, or otherwise howsoever satisfy or discharge any legacy, or any part of any legacy, or the residue of any personal estate, or any part thereof, to which any other person or persons shall be entitled, and upon which any duty shall be chargeable by virtue of this act, having received or deducted the duty so chargeable, then and in every of such case, the duty which shall be due and payable upon every such legacy, and part of legacy, and residue, and part of residue respectively, and which shall not have been duly paid and satisfied to his majesty, his heirs and successors, according to the provisions of this act, shall be a debt of such person or persons having or taking the burden of such execution or administration as aforesaid, to his majesty, his heirs and successors; and in case any such person or persons, so having or taking the burden of such execution or administration as aforesaid, shall deliver, pay, or otherwise howsoever satisfy or discharge any such legacy or residue, or any part of any such legacy or residue, to or for the benefit of any person or persons entitled thereto, without having received or having deducted the duty chargeable thereon (such duty not having been first duly paid to his majesty, his heirs or successors, according to the provisions herein contained), then and in every such case such duty shall be a debt to his majesty, his heirs and successors, both of the person or persons who shall make such delivery, payment, satisfaction, or discharge, and of the person or persons to whom the same shall be made.” (i)

ed it, the amount to be a debt from them to his majesty; and if they pay legacies without deducting the duty, it shall be a debt from both parties.

Sect. 7. “That any gift by any will or testamentary instrument of any person dying after the passing of this * act, which shall, by virtue of such will or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or

What shall be deemed legacies within the intent of this act.

(i) But where two legacies, though the duty on the other, nor has the crown given in respect of the same portion of any lien on the subject of the one legacy the testator's property, are distinct and in respect of duty on the subject of the separate, the legatee of the one legacy is other. *Atty. Gen. v. Giles*, 5 H. & N. 255. not a debtor to the crown in respect of

she shall think fit, (*j*) shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix who shall give the same; except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given; and every gift which shall have effect as a donation *mortis causa*, shall also be deemed a legacy within the intent and meaning of this act."

Sect. 8. "That the value of any legacy given by way of annuity, (*k*) whether payable annually or otherwise, for any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be calculated, and the duty chargeable thereon shall be charged, according to the tables in the schedule hereunto annexed. (*l*) And the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall *be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively; and the value of any such annuity, if determinable upon any contingency besides the death of any person or persons, shall be calculated without regard to such contingency; provided always, That if any such annuity shall determine by the death of any person, before four years' payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time

(*j*) See *In re Cholmondeley*, *post*, 1623; *Platt v. Routh*, *post*, 1624, and stat. 8 & 9 Vict. c. 76, s. 4; *post*, 1623.

(*k*) See *Crow v. Robinson*, 31 L. J. N. S. Ch. 516, as to what are annuities within this section.

(*l*) In the *Atty. Gen. v. Wynford*, 9 Ex. 746, a question arose on the construction of a will, whether a legatee took an annuity for his own life only, or for the joint lives of himself and his wife,

which was material, inasmuch as, by these tables, a larger amount of duty was payable in the former case. New tables are given in lieu of these, by the 31st section of the act (16 & 17 Vict. c. 51) *post*, 1601. But it has been held that the new tables apply only to legacies given after the 19th May, 1853 (when the act came in force). In *re Earl Cornwallis*, 11 Ex. 580.

determine upon any other contingency than the death of any person or persons, then and in such case, not only all payments of duty which would otherwise become due after the happening of such contingency, if any such would become due, shall cease; but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due, to apply for and obtain a return of so much of the duty so paid as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same shall have endured, which abatement the said commissioners for management of the stamp duties shall settle and determine according to the tables in the schedule hereunto annexed, and shall cause the amount of such abatement to be paid to the person or persons entitled to the same, out of any moneys in their hands arising from the duties imposed by this act."

Sect. 9. "That the value of any legacy given by way of annuity for any life or lives, or for years determinable on any life or lives, or for years or other period of time, and charged on and made payable out of any other legacy or legacies, shall be calculated, and the duty shall be charged thereon, in the same manner as hereinbefore directed with respect to other annuities; and the duty on the legacy charged with such annuity, if any duty shall be payable for such legacy, shall be calculated on the value of such legacy, *after deducting the value of such annuity; and the duty for such annuity shall be paid by the person or persons entitled to the legacy or legacies charged with such annuity, by four equal payments, in the same manner as the same would be payable according to the provisions hereinbefore contained, if such annuity had been a direct gift to the annuitant, and subject to the like proviso in case such annuity shall determine before four years' payments shall become due; and the payment which shall be made for such duty shall be retained by the person or persons paying the same, out of the first four years' payments of such annuity, if so many shall become due, or out of so many of such payments as shall become due by equal portions."

The value of annuities payable out of legacies, and the duty, to be calculated according to the annexed tables, and the duty to be charged on the value of such legacies after deducting such annuities, &c.

Sect. 10. "That the duty payable upon any legacy given by direction to purchase with any personal estate of the testator or testatrix, or any part thereof, an annuity of a

Duty on legacies given to

[1560].

purchase annuities to be calculated on the sums necessary to purchase them.

certain amount for the life or lives of any person or persons, or any other term, shall be calculated upon the sum necessary to purchase such annuity according to the tables before mentioned, and shall be deducted from such sum, and paid as in the case of other pecuniary legacies; and the person or persons paying or satisfying such legacy, and the person or persons for whose benefit the same shall be paid or satisfied, shall be discharged, by payment of such duty so calculated as aforesaid, from all other demands in respect of the duty payable on such legacy; and the annuity to be purchased for the benefit of the person or persons entitled to the benefit of such legacy shall be reduced in proportion to the amount of the duty payable thereon as aforesaid, such reduction to be calculated in the same manner as the duty so payable as hereinbefore directed to be calculated; and the purchase of such reduced annuity, together with the payment of such duty, shall satisfy and discharge such legacy as fully as if an annuity had been purchased equal in amount to the annuity so directed to be purchased."

Sect. 11. "If any benefit shall be given by any will or testamentary instrument, in such terms that the amount or
 Duty on legacies whose value can only be ascertained by application of the allotted fund, to be charged on the money as applied. (m) * value of such benefit can only be ascertained from time to time by the actual application for that purpose of the fund allotted for such purpose, or made chargeable therewith; or if the amount or value of any benefit given by any will or testamentary instrument, cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained; then and in every such case such duty shall be charged upon the several sums of money or effects which shall be applied from time to time for the purposes directed by such will or testamentary instrument, as separate and distinct legacies or bequests, and shall be paid out of the fund applicable for such purposes or charged with answering the same."

Sect. 12. "The duty payable on a legacy, or residue, or part of residue, of any personal estate given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall
 How duty on legacies enjoyed by persons in succession, or having

(m) See *In re Wilkinson post*, 1634, 1635; *Atty. Gen. v. Fitzgerald, post*, 1635.

be charged upon and paid out of the legacy, or residue, or part of residue so given, as in the case of a legacy to one person; and where any legacy, or residue, or part of residue shall be given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become * entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce; and where any other partial interest shall be given, or shall arise out of such property so to be enjoyed in succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is hereinbefore directed to be charged and paid in like cases of partial interests, charged on any property given, otherwise than to different persons in succession; and all and every person and persons who shall become absolutely entitled to any such legacy, or residue, or part of residue, so to be enjoyed in succession, shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession.” (n)

(n) See *Atty. Gen. v. Giles*, 5 H. & N. 255. A testator bequeathed his residuary estate to his daughter for life, after which to her husband. On the testator's death 17. per cent. duty was paid on her life interest, according to this section. Afterwards her husband, having bequeathed his personal estate to her, predeceased her. His executors disclaimed the bequest to him in the original will, and contended, consequently, that the residue of his wife's father's estate passed, as undisposed of, to her as his sole next of kin, and was chargeable, therefore, with only 17. per cent. duty, and not 107. per cent. (the rate payable by the husband). But it was held

Sect. 13. "That the duty payable on any legacy, or residue, ^{and by whom payable.} or part of residue, so given to or so to be enjoyed by different persons in succession, upon whom the duty shall be chargeable at one and the same rate, shall be deducted and paid by the person or persons having or taking *the burden of the execution of the will or testamentary instrument under which the title thereto shall arise, upon payment or other satisfaction or discharge of every or any part of such legacy or residue, or part of residue, to any trustee or trustees, or other person or persons to whom the same shall be payable, or paid in trust or for the benefit of the persons so entitled thereto in succession; and if the same shall not be so paid or satisfied to any such trustee or trustees, then such duty shall be deducted and paid out of the capital of the property so given, upon receipt, by any of the persons so entitled in succession, of any produce of such capital, or any part thereof, according to the amount of the capital of which such produce shall be so received; and where the duty chargeable upon any such bequest for the benefit of or to be enjoyed by different persons in succession, shall be chargeable at different rates, so that the same cannot be paid at one and the same time, but must be paid in succession as aforesaid, then and in such case, all and every the person and persons having or taking the burden of the execution of the will or testamentary instrument in which such bequest shall be contained, shall be chargeable with such duties in succession, in the same manner as such persons would be chargeable with the like duties in case of immediate bequest; unless the property bequeathed shall have been paid or otherwise satisfied to or vested in any trustees or trustee as aforesaid, in which case such trustees or trustee, or his, her, or their representatives, shall be chargeable with the duties for and in respect of such property so vested in him, her, or them respectively, in such and the same manner as if he, she, or they had had or taken the burden of the execution of the will or testamentary instrument, by which such bequest shall have been made; and in like manner, where any partial interest shall be given, or shall arise out of any such property so to be enjoyed in succession, and such partial interest shall be satisfied or paid by the person or persons so enjoying such property, such person or persons shall be chargeable with

that the disclaimer was inoperative as to the duty. *Atty. Gen. v. Munby*, 3 H. & N. 826.

the duties *for and in respect of such partial interest, and shall retain and pay the same accordingly, in such and the same manner as if he, she, or they had had or taken the burden of the execution of the will or testamentary instrument, by which such partial interest shall have been created; and in all such cases, the person persons so chargeable with duty shall be debtors to the king's majesty, his heirs and successors, in like manner, and shall be subject to the like penalties as the person or persons having or taking the burden of the execution of such will or testamentary interest are hereby made chargeable and subject to."

Sect. 14. "Provided always, That no duty shall be paid on any articles of plate, furniture, or other things, not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by, different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof, so as to convert the same into money or other property yielding an income; but if the same shall be actually sold and disposed of, or shall come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then, and in each and every such case, the same duty shall be chargeable and paid thereon as if the same had been originally given absolutely, and with full power to sell or dispose thereof, and shall be chargeable upon and paid by the person or persons for whose benefit the same shall be sold, or who shall have power to sell or dispose thereof, or an absolute interest therein, and shall become the debt of such person or persons; but shall not be a charge on any person or persons by reason of his, her, or their having assented to such bequest, as the person or persons having or taking the burden of the execution of the will or testamentary instrument by which such bequest shall have been made."

Plate, &c. while enjoyed in kind, not liable to duty till in possession of persons having power to dispose thereof.

Sect. 15. "Provided always, That where any legacy, or any residue, or part of residue, shall be so given by any will or testamentary instrument, that different persons shall *become entitled thereto in succession, the duty shall be charged thereon as given to be enjoyed in succession, whether the person or persons entitled thereto shall take the same under or by virtue of such will or testamentary instrument, and the dispositions therein con-

Duty on legacies enjoyed in succession to be charged as such, whether taken under wills or by intestacy.

tained, or in default of such dispositions, and as entitled by intestacy."

Sect. 16. "Where any legacy, or residue, or part of residue, shall be given to or for the benefit of any person or persons in joint tenancy, some or one of whom shall be chargeable with any duty hereby imposed, and some or one of whom shall not be so chargeable, the person or persons chargeable with duty shall pay such duty in proportion to the interest of such person or persons respectively in such bequest; and if any person or persons chargeable with duty, and entitled in joint tenancy as aforesaid, shall become entitled by survivorship, or by severance of the joint tenancy, to any larger interest in the property bequeathed, than that in respect of which such duty shall have been paid, then and in such case all and every such person or persons so becoming entitled by survivorship, or by severance, shall be charged with the same duty as if the property to which such joint tenant or joint tenants shall so become entitled had been originally given to or for the benefit of such person or persons only."

Duty on legacies in joint tenancy to be paid in proportion to the interests of the parties.

Sect. 17. "When any legacy, or any residue, or part of residue, shall be given, subject to any contingency which may defeat such gift, and whereupon the same may go to some other person or persons, such bequest (unless chargeable as an annuity under the provisions herein contained) shall be charged with duty as an absolute bequest, to the person or persons who shall take the same subject to such contingency, and such duty shall be paid out of the capital of such legacy, or residue, or part of residue, notwithstanding the same may, upon such contingency, go to some person not chargeable with the same duty, or with any duty; and if such contingency shall afterwards happen, and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator or *testatrix, under the same title would have been chargeable with a higher rate of duty than the duty so paid, the person or persons becoming entitled thereto shall be charged with and shall pay the difference between the duty so paid and such higher rate of duty."

Duty on legacies subject to contingencies, to be charged as for absolute bequests, &c.

Sect. 18. "Where any legacy, or the residue, or any part of the residue, of any personal estate, shall be subjected to any power of appointment to or for the benefit of any per-

How duty on legacies subject to

son or persons specially named or described as objects of such power, such property shall be charged with duty as property given to different persons in succession; and in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall, in respect of their several interests, whether previous, or subject to, or under, or in default of such appointment, be charged with the same duty, and in the same manner, as if the same interests had been given to him, her, or them, respectively, in and by the will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be; and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof; and where any property shall be given with any such general power of appointment, which property, *in default of appointment, will belong to the person or persons to whom such power shall also be given, such property shall be charged with, and shall pay the duty by this act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment.”

power of
appoint-
ment
shall be
charged;
(o)

Sect. 19. “Any sum of money or personal estate, directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate unless the same shall have been actually

and how
on per-
sonal es-
tates di-
rected to be
applied in
purchase
of real es-
tates.

(o) See *Platt v. Routh*, *post*, 1624; *Atty. Gen. v. Brackenbury*, 1 H. & C. 782, *post*, 1625.

applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied. Provided, nevertheless, That in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate, to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase." (p)

*Estates pur
auter vie
applicable
as personal
estates, to
be charged
as such.*

Sect. 20. "That estates *pur auter vie*, applicable by law in the same manner as personal estate, shall be charged with the duties hereby imposed as personal estate."

*Money left
to pay
duty not
chargeable
as a leg-
acy. (q)*

Sect. 21. "Provided always, That if any direction shall be given, by any will or testamentary instrument, for payment of the duty chargeable upon any legacy or bequest out * of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy, to or for the benefit of the person or persons who would otherwise pay such duty."

*Mode of
ascertain-
ing duty
on prop-
erty not re-
duced into
money.*

Sect. 22. "In cases of specific legacies, and where the residue of any personal estate shall consist of property which shall not be reduced into money, it shall be lawful for the person or persons having or taking the burden of the administration of such effects, or the person or persons by whom the duty thereon ought to be paid, to set a value thereon, and offer to pay the duty according to such value, or to require the commissioners for management of the stamp duties, to appoint a person to set such value, at the expense of

(p) *De Lancey v. The Queen*, L. R. 6 title a legatee to receive his legacy free of Ex. 286, affirmed in *Cam. Scacc.* L. R. duty, see the cases collected, *infra*, 1643 7 Ex. 140. *et seq.*

(q) As to what terms in a will shall en-

the person or persons by whom such duty ought to be paid ; and it shall be lawful for the commissioners to accept the duty offered to be paid, upon the value set by the person or persons having or taking the administration of such effects, or by whom the duty for the same shall be payable without such appraisement, if the said commissioners shall think fit so to do ; but if the said commissioners shall not be satisfied with the value so set, on which the duty shall be so offered, it shall be lawful for the said commissioners, notwithstanding such offer, to appoint a person to appraise such effects, and to set the value thereon, on which value so set the said commissioners shall assess the duty payable in respect thereof, and require the same to be paid ; but if the person or persons by whom such duty shall be payable, shall not be satisfied with the valuation made under the authority of the said commissioners, and pay the duty accordingly, it shall be lawful for such person or persons to cause the * valuation so made under the authority of the said commissioners, to be reviewed by the commissioners of the land tax for the time being, of the district or place where such effects shall be at their next meeting, after the said commissioners for management of the stamp duties shall have assessed and required payment of such duty as aforesaid, if fourteen days shall have elapsed between such time and the meeting of the said commissioners of land tax, and if not, then at the next succeeding meeting of the said commissioners, of which appeal six days' notice shall be given to the said commissioners of stamp duties ; and the said commissioners of the land tax shall and may (if they think fit) appoint a person to appraise such effects, and set a value thereon, and shall and may hear and determine such appeal, in the same manner as in any other cases of appeal to them, and with the like authorities, and their judgment shall be final ; and if the valuation made under the authority of the said commissioners of the stamp duties in the case last mentioned, shall not be duly appealed from within the time aforesaid, or shall be affirmed upon appeal, the duty shall be paid according to such valuation ; and if any variation shall be made on such appeal, the duty shall be paid according to such variation ; and if the duty assessed in manner aforesaid shall exceed the duty offered to and refused by the said commissioners of stamp duties, the expense of such appraisement and other proceedings in assessing such duties, shall be borne by the person or persons by whom such duty shall be payable ;

and if any dispute shall arise between any person or persons entitled to any such legacy, or residue, or part of residue, and any person or persons having or taking the burden of the administration of such effects, with respect to the value thereof, or with respect to the duty to be paid thereon, the duty shall be assessed by the said commissioners of stamp duties on reference to them by either party for that purpose; and if the value of any property on which such duty ought to be paid shall be in dispute, the said commissioners of the stamp duties shall cause an appraisal to be made thereof *at the expense of the person or persons by whom such duty ought to be paid, in the manner hereinbefore directed in other cases, and assess the duty thereon accordingly; and if such person or persons by whom such duty ought to be paid, shall be dissatisfied with such valuation, or with the assessment of duty made upon such valuation, by the said commissioners of the stamp duties, the same shall be reviewed and finally determined by the said commissioners of the land tax, upon appeal to them within the time, and under the restrictions, and in the manner hereinbefore directed in other cases; but if such valuation or assessment shall not be duly appealed from within the time limited for that purpose, or shall be affirmed upon appeal, the duty shall be paid according thereto; and if any variation shall be made therein on such appeal the duty shall be paid according to such variation; and in case the effects whereon any such duty shall be payable shall be at the distance of ten miles from London, then and in such case it shall be lawful to make the like application to such person as shall be deputed for that purpose by the said commissioners to act in their stead, in such cases, within the county or district in which such effects shall be; and such person so deputed shall act in such cases, in all respects, in the same manner as the said commissioners are hereby authorized to act, subject nevertheless to the instructions and control of the said commissioners."

Sect. 23. "Where any legacy, or part of any legacy, or residue, or part of any residue, whereon any duty shall be chargeable by this act, shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released for consideration or compounded for less than the amount of value thereof, then and in such case the duty shall be charged and paid in respect of such legacy, or part of legacy, or res-

Duty on legacies not satisfied in money, &c. to be paid according to the value of the satisfaction.

idue, or part of residue, according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof or composition for the same. Provided always, That if any legacy, or bequest, shall be made in satisfaction *of any other legacy, or bequest, or title to any residue, or part of residue, of any personal estate remaining unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty."

Sect. 24. "If any person or persons having or taking the burden of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, or any person or persons hereby made chargeable with duty, shall declare himself, herself, or themselves ready and willing, and shall accordingly offer to pay any pecuniary legacy, or residue, or part of residue, deducting the duty payable thereon, or shall in like manner offer to deliver or otherwise dispose of any specific legacy, or any specific property, part of any residue of any personal estate, to or for the benefit of the person or persons entitled thereto, or to any trustee or trustees for such person or persons, upon payment of the duty payable in respect thereof, and the person or persons entitled to such legacy, or residue, or part of residue, or the trustee or trustees for such person or persons, shall refuse to accept such offer and to give a proper release and discharge for such legacy or residue, or so much thereof as shall be offered to be paid, delivered, or otherwise disposed of as aforesaid, then and in such case, although no actual tender shall be made, if any suit shall be afterwards instituted for such legacy or effects, respecting which such offer shall have been made, it shall be lawful for the court in which suit shall be instituted, to order all costs, charges, and expenses attending the same, to be paid by the person or persons who shall have refused to accept such offer, and to give or join in such release or discharge, or to order such costs, charges, and expenses, to be deducted and retained out of such legacy or effects, together with the duty payable thereon, as the said court shall see fit; and in case any suit shall be instituted for payment of any legacy, or residue, or part of residue, of any personal estate, and the person or persons sued for the same *shall be desirous of staying proceedings in such suit, on payment of the money

If legatees refuse to accept legacies, duty deducted, the court, in case of suit, may order them to pay costs:

and in suits where the party sued may wish to stop pro-

ceedings on payment of bequests deducting duty, the court may make order therein.

due, or delivering or otherwise disposing of the specific effects demanded, after deducting or receiving the duty payable thereon, it shall be lawful for the court in which such suit shall be instituted, if it shall see fit, on application in a summary way, to make such order for payment of such legacy, or residue, or part of residue, or for delivering or otherwise disposing of such effects, and for payment of the duty payable thereon, and all such costs, charges, and expenses attending such suit, as shall be just."

Sect. 25. "If any suit shall be instituted concerning the administration of the personal estate of any person dying testate, or intestate, or any part of such estate in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her personal estate, or any part thereof, the court wherein such suit shall be instituted shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed; and in taking any account of any personal estate, or otherwise acting concerning the same, such court shall take care that no allowance shall be made in respect of any legacy, or part of legacy, or of any residue, or part of residue, in any manner whatsoever, without due proof of the payment of the duties hereby imposed."

Sect. 26. "Provided always, That any person or persons having or taking the burden of the execution of any will or other testamentary instrument, or the administration of the personal estate of any person deceased, may from time to time pay, deliver, or otherwise dispose of any legacy, or any part of any legacy, or make distribution of any part of the residue of any personal estate, on payment, from time to time, of such proportions of the duty hereby imposed, as shall accrue in respect of such part of such personal estate as shall be so administered."

***Sect. 27.** "No person or persons having or taking the burden of the execution of any will or testamentary instrument, or the administration of the personal estate of any person deceased, nor any trustee or trustees, or other person or persons hereby directed and required to account for

No legacy liable to duty, to be paid without a receipt con-

(r) See *Foster v. Ley*, 2 Bing. N. S. W. 381. See, also, *Hicks v. Keat*, 3 Beav. 1402; *post*, 1649; *In re Sammon*, 3 M. & 141.

any duty, shall, from and after the passing of this act, pay, deliver, or otherwise dispose of, or in any manner satisfy, discharge, or compound for any legacy whatsoever, or any part thereof, or the residue of any personal estate, or any part thereof, in respect whereof any duty is hereby imposed, without taking a receipt or discharge in writing for the same, expressing the date of such receipt or discharge, and the names of the testator, testatrix, or intestate, under whose will, or testamentary disposition, or upon whose intestacy the title to such legacy, or part of legacy, or to such residue, or part of residue, shall accrue, and of the person or persons to whom such receipt or discharge shall be given, and of the person or persons to whom such legacy, or residue, or part of residue, shall have been given, or shall have belonged in consequence of intestacy, and the amount or value of the legacy, or part of legacy, or residue, or part of residue for which such receipt or discharge shall be given, and also the amount and the rate of the duty payable and allowed thereon; and that no written receipt or discharge for any legacy or part of any legacy, or for the residue of any personal estate, or any part of such residue, in respect whereof any duty is hereby imposed, shall be received in evidence, or be available in any manner whatever, unless the same shall be stamped, as required by this act; and no evidence whatsoever shall be given of any payment, satisfaction, or discharge whatsoever, or of any release or composition of such legacy, or any part thereof, or of such residue, or any part thereof, without producing such receipt or discharge, duly stamped as aforesaid, unless the actual payment of the duty hereby imposed shall first be given in evidence. Provided always, That a copy of the entry, in the books of the commissioners of stamps, of the payment of such duty, *shall be admitted as evidence thereof. Provided also, That payment of any annuity shall not be deemed a payment for which such stamped receipt shall be required, under the directions of this act, except the several payments which shall complete the payments for each of the first four years, during which such annuity shall be payable; and in like manner any payment in respect of any legacy or bequest, hereby directed to be charged with the duty in the same manner as annuities are hereby made chargeable with duty, shall

taining certain particulars;

no receipt available unless duly stamped, &c.

Copy of entry at stamp office of payment of duty, evidence.

Stamped receipts for annuities not required but on completing payments for each of the first four years.

not be deemed a payment for which such stamped receipt shall be required, except the several payments which shall complete the payments for each of the first four years in respect of which such legacy or bequest shall be chargeable with duty as an annuity."

Sect. 28. "That any person having or taking the burden of the execution of any will or testamentary instrument, or the administration of the personal estate of any person deceased, and any trustee or trustees, or other person or persons hereby directed and required to account for any duty, who shall pay, deliver, or otherwise dispose of, or in any manner satisfy or discharge, or compound for any legacy given by such will or testamentary instrument, or the residue, or any part of the residue, of such personal estate, to or for the benefit of any person or persons entitled to such legacy or any part thereof, or to such residue, or any part thereof, without taking such receipt or discharge in writing as aforesaid, and causing the same to be stamped within the time hereby allowed for stamping the same, shall forfeit and lose the sum of ten pounds *per centum* on the sum of money, or the value of the property if not money, for which such receipt or discharge ought to have been given in pursuance of this act; and all and every person and persons receiving or taking the benefit of any such money, or other property without giving a written receipt or discharge for the same, in which the duty payable in respect thereof shall be expressed to have been allowed or paid to the person or persons to whom such receipt or discharge shall be given, * and which shall bear date on the day of signing the same, shall forfeit and lose the sum of ten pounds *per centum* on the sum of money, or on the value of the property, so received or taken."

Penalty of 10l. per cent. for paying or receiving legacies without stamped receipts.

Sect. 29. "Every such receipt or discharge shall be brought within the space of twenty-one days after the date thereof, to the said head office of the said commissioners, or to some other office to be appointed by the said commissioners for such purpose, to be stamped, paying the duty for the same, and upon such payment either at the said head office, or at any other office to be appointed as aforesaid, the receiver general or other proper officer to be appointed for that purpose by the said commissioners, as the case shall require, shall write upon such receipt or

Receipts to be stamped within twenty-one days after date, on which an acknowledgment of payment of the duty shall be written, &c.

discharge an acknowledgment of the payment of the duty so paid in words at length, and bearing date the day on which such payment shall be made, and shall subscribe his name thereto, and enter an account thereof in a book or books to be provided for that purpose, to the intent that he may be thereby charged with the sum so paid; and in case the duty shall be so paid at the said head office, then the receipt or discharge so brought to be stamped, shall be forthwith stamped with one of the said four stamps as the case shall require; and in case the duty shall be so paid at any other office to be appointed by the said commissioners as aforesaid, the receipt or discharge whereon such acknowledgment of the payment of duty shall be so written and subscribed, shall be transmitted within the space of twenty-one days from the day of payment of such duty to the said head office to be stamped, and the same shall be stamped accordingly with one of the said four stamps as the case shall require; and in case the person or persons paying such duty at any such office to be appointed as aforesaid, shall be desirous that the same should be transmitted to the said head office, by the officer to whom such duty shall be paid, and shall leave the same with such officer for such purpose, such officer shall thereupon sign and deliver an *acknowledgment, that such receipt or discharge has been left with him for such purpose, and shall transmit such receipt or discharge to such head office to be stamped as aforesaid, and the same shall be sent again to such officer as soon as conveniently may be after the stamping thereof; and such officer shall deliver back the same to the person or persons entitled thereto, upon redelivery to him of the acknowledgment which he shall have given for the same. Provided always, That if any such receipt or discharge shall not be so brought to any such office as aforesaid, within such space of twenty-one days as aforesaid, it shall nevertheless be lawful to carry such receipt or discharge to the said head office to be stamped in like manner, within three calendar months after the date thereof, paying the duty for the same, and also the further sum of ten pounds *per centum* on such duty, by way of penalty for not having before paid such duty on payment of which duty and penalty, the said commissioners are hereby authorized and required to stamp such receipt or discharge, in the same manner as if the same had been brought

Receipts
may be
stamped
within
three
months
after date,
on payment
of duty,
and 10*l.*
per cent.
penalty;

to the said office within the space of twenty-one days from the date thereof; but the said commissioners, or any of their officers, shall not on any pretence whatever, except as hereinafter directed, stamp any vellum, parchment, or paper, upon which any receipt or discharge for any legacy, or part of legacy, or any residue of any personal estate, or any part thereof, shall be written or signed with the said new stamps, or any of them, unless the duty for the same shall be paid, and such receipt or discharge shall be produced to be so stamped in manner aforesaid, within the times and in the manner hereinbefore respectively limited and appointed." (s)

* Sect. 30. "If it shall appear to the satisfaction of the said commissioners of stamp duties, upon oath or affirmation to be administered by a justice of the peace, or master or masters extraordinary in chancery, which oath or affirmation such person or persons are hereby empowered to administer, that less duty has been paid for any legacy, or residue, or part of residue, than ought to have been paid for the same, by mistake, without any intention to defraud; and if application shall be made to the said commissioners to rectify such mistake, and accept the duty really due before any suit shall be instituted concerning the same, and within three calendar months after payment of the money actually paid instead of the just duty, it shall be lawful for the said commissioners to accept the difference between the

(s) But now, by stat. 48 Geo. 3, c. 149, s. 44: "Commissioners may stamp receipts for legacies, after three months from the date on payment of duty and penalty; and remit penalty (within twenty-one days), if signed out of Great Britain. s. 44, "in all cases not provided for by the preceding clause, where any receipt or discharge given for any legacy, or for the residue, or any share of the residue, of any personal estate, which shall have been given by will or other testamentary instrument, or have devolved to any person or persons upon intestacy, shall be brought to the head office, to be stamped after the expiration of three calendar months from the date thereof, it shall be lawful for the said commissioners to cause the same to be duly stamped, for making the same available, on payment of the duty, which shall be payable in respect thereof, together with the penalty incurred, in consequence of the same not having been brought to be stamped, before the expiration of such three calendar months; and where any such receipt or discharge shall have been signed out of Great Britain, if the same shall be brought to be stamped, within twenty-one days after its being received in Great Britain, it shall be lawful for the said commissioners to remit any penalty that may have been incurred thereon, and to cause the same to be duly stamped, on payment of the duty payable in respect thereof; anything contained in any former act or acts to the contrary notwithstanding."

money paid and the just duty, together with the sum of ten pounds *per centum* on such difference by way of penalty in full for the just duty, and which shall be in discharge of all penalties incurred by non-payment of such duty, and to cause an acknowledgment of the payment of the just duty to be written on the receipt or discharge given for such legacy or residue or part of residue, and to be subscribed by the proper officer, and also to cause such receipt or discharge to be properly stamped, if necessary, in the same manner as would have been done if the just duty had been originally paid."

Sect. 31. "Provided always, and be it further enacted, * That the party or parties paying or satisfying any legacy, or any residue of any personal estate, or any part of such residue, or receiving the same, contrary to the provisions of this act, who shall, within the space of twelve calendar months after the offence committed, discover the other party or parties offending therein, so that such party or parties so discovered be thereupon convicted, such person so discovering shall be indemnified and discharged from all penalties incurred for any offence against this act."

Persons paying or receiving money contrary to this act, indemnified on discovering the other offender.

Sect. 32. There has already been occasion to state *verbatim* the earlier part of this section, (*t*) by which it is provided that if by reason of the infancy, or absence beyond seas, of the legatees, legacies cannot be properly paid, the money may be paid into the bank of England.

If by infancy or absence legacies cannot be paid, the money may be paid into the bank.

The statute proceeds to provide, that if it shall afterwards appear that such money has been improperly paid into the bank, the court of chancery upon petition, in a summary way, may dispose thereof, in such manner, as justice shall require. And if it shall appear that the duty paid in respect of any such sum of money was more than ought to have been paid, the person who shall have paid such duty may apply to the commissioners of stamps

Provisions in case such money be improperly paid in; provisions in case of payment of too much or too little duty.

to repay such excess, and they may repay such excess; and if the duty paid appear to be less than the duty which ought to have been paid, the person who paid such money, upon payment of the full duty to the said commissioners, in such manner as the same ought to be paid, with such penalties, if any, as ought to be paid in respect thereof, may apply to the court of chancery,

(*t*) See *ante*, 1407.

in a summary way, for the repayment of the further sum paid to the said commissioners for such duty, out of the money in the bank so paid in by such person, which payment the said court is authorized to order.

Sect. 33. " If at the end of two years after the death of any person deceased, it shall appear to the satisfaction of the said commissioners of stamp duties, that it will require * time to collect the debts or effects of such person then outstanding, or that from circumstances it will be difficult to ascertain or adjust the amount of the clear residue of the personal estate of such person liable to duty, and the parties interested therein shall be desirous of compounding for the duty thereon, it shall be lawful for such parties respectively, with the consent of the commissioners of stamp duties, to make application to the court of exchequer at Westminster, if the deceased person resided in England or elsewhere, except in Scotland, and to the court of exchequer in Scotland, if the deceased resided in Scotland, for leave to compound such duty, stating upon oath the particulars of the personal estate for which such composition shall be proposed to be made, by affidavit to be filed in the said court, and declaring at the same time upon oath, whether any other property of the deceased then outstanding, besides the property for which such composition shall be proposed to be made, hath come to the knowledge of the said parties, or any of them, and the nature thereof, and the circumstances attending the same; and in such case it shall be lawful for the said court of exchequer in England or Scotland, as the case may be, to appoint a proper person to set a value on the personal estate, or such part thereof, for which no duty shall have been charged, and which shall be specified in such affidavit as the property for which such composition shall be desired, and to adjust and settle the duty, which justly and equitably under all circumstances, ought to be paid in respect of such personal estate so specified, and thereupon it shall be lawful for the said commissioners, and, they are hereby required, if the said court of exchequer to which such application shall be made shall confirm the said adjustment and settlement, and order the duty to be accepted accordingly, and by authority of such order to accept payment of the sum so adjusted and settled, in full discharge of the duty on

If it shall appear to the commissioners for stamps at the end of two years after the death of any person, that it will require time to collect the effects, or be difficult to ascertain the residue of the personal estate, the duty may be compounded for:

so much of such personal estate as shall be so specified, and according to such order, and to enter the same in their books accordingly, and to grant certificates thereof, expressing the * receipt of such duty by way of composition under such order; and every such person to whom such certificate shall be granted, and every future representative of the same estate, and all persons entitled to the benefit of the property, for which such composition shall be so paid, shall be discharged from any further payment of duty on the same; and in all future payments of such property, it shall be lawful for the persons having or taking the burden of the execution of any will or testamentary instrument disposing such property or the administration thereof, to pay, apply, and dispose of the same, and for all persons entitled to the benefit thereof to receive the same, without having the receipts and discharges in writing, hereby required to be given and taken for the same, stamped as hereinbefore directed; provided such receipts or discharges shall express the same to be given under the authority of such composition as aforesaid, and not liable to duty. Provided always nevertheless, That the duty shall be charged and paid upon all and every part of the personal estate of such person deceased, other than that which shall be specified in such affidavit as aforesaid, and included in the valuation in which such composition shall have been made as aforesaid, and for which the said court of exchequer shall allow and order such composition to be taken as aforesaid in the same manner as if no such composition had been made; and all and every person and persons shall be liable to all the like penalties and forfeitures for not duly paying the duty for such personal estate not compounded for, and subject to the like rules, methods, and directions for charging such duty, as such person and persons respectively would be liable to if such composition had not been made."

duty to be paid on any part of personal estates not included in the composition.

Sect. 34. "And be it further enacted, That if at any time after payment of duty on any legacy, or residue, or part of residue, of the personal estate of any person deceased, any debt shall be recovered against the estate of such deceased person, or any loss shall happen, by reason whereof, or for any other just cause, any legatee or other person, by whom any legacy or part of legacy, or any residue of any personal * estate hath been received or retained, shall be obliged to refund the same, or any part thereof, then in every such case it

If any legacy be refunded, the duty to be repaid.

shall be lawful for the said commissioners of stamp duties, and they are hereby required, on due proof made on oath as aforesaid, to their satisfaction, of the amount of such sums refunded, and that by reason thereof there hath been an over-payment of duty, to settle and adjust the amount of such over-payment, and to repay the same out of the money in their hands, arising from the duties by this act imposed, or to allow the same in future payments as the case may permit or require."

Executors previous to retaining their legacies to transmit the particulars with the duty offered, to the commissioners of stamps, who shall charge the same agreeable to this act. Sect. 35. "Whenever any person or persons having or taking the burden of the execution of any will or testamentary instrument, or the administration of any personal estate as aforesaid, shall be entitled to any legacy, or the residue, or any part of the residue, of the personal estate of any testator, testatrix, or intestate, such person shall be chargeable with the duty whenever he, she, or they shall be entitled, in the due course of administration, to retain to his, her, or their own use, any part of the said estate, in satisfaction of such legacy, or residue, or any part thereof; and every such person, before any such retainer, shall transmit to the said commissioners of stamp duties or their officers, a note containing the particulars of such legacy, residue, or part of residue, intended to be retained, and the amount or value thereof, and the duty which such person or persons shall offer to pay thereon, and the said commissioners shall charge and assess the duty thereon, in such manner as the duty shall be chargeable thereon by virtue of the provisions of this act contained, and such duty shall be paid accordingly; and on payment of the said duty, the said receiver general of the said duty, or officer appointed to receive the same, shall, at the foot of a duplicate of the said assessment duly stamped, in such manner as the said commissioners shall direct for such purpose, give a receipt for such duty in such form of words as the said commissioners shall direct, which receipt shall be a discharge for the duty expressed *therein; and in case any such person or persons shall neglect to pay such duty as aforesaid, within fourteen days after the same ought to have been paid as aforesaid, every such person or persons shall forfeit and pay treble the value of the duty which ought to have been paid."

Penalty for neglect of payment of duty for fourteen days.

If administration be

Sect. 37. "The authority under or by color of which any person shall have administered the estate or effects of

any person deceased, or any part thereof, shall be void, or be repealed, or declared void, and such person shall before the avoidance, repeal, or declaration of avoidance, have paid any duty hereby imposed, or any duty imposed by any of the said former acts, which shall not be allowed to such person out of the estate or effects of such deceased person, by reason that the same duty was not really due or payable, the money paid for such duty shall, on proof thereof to the satisfaction of the said commissioners of stamp duties, be repaid to the person or persons who shall have paid the same, or his, her, or their representatives, by the said commissioners, out of any moneys in their hands arising from the duties imposed by this act, or the said former acts; but in case such duty ought to have been paid by the rightful executor or executors, administrator or administrators, of such deceased person, then and in such case, the payment of such duty shall be valid and effectual, notwithstanding such avoidance, repeal, or declaration of avoidance as aforesaid; and no such person shall, by reason of the avoidance, repeal, or declaration of avoidance of such authority, be sued, molested, or troubled for or in respect of such payment; but all such payments, in respect of the said duty, shall be allowed in account with such rightful executor or executors, administrator or administrators, and the same shall be deemed payments in the due course of administration, as fully and effectually as if such payments had been made by rightful executors or administrators; any law, usage, or custom to the contrary notwithstanding.” (u)

made void, and any duty shall have been improperly paid, it shall be repaid, but if it ought to have been paid; it shall be allowed in account with the rightful executor.

* The statute 44 Geo. 3, c. 98, after reciting that the several duties therein mentioned are become very numerous, intricate, and complicated, and it will naturally contribute

44 Geo. 3, c. 98.

(u) By an instrument purporting to be the will of S. deceased, the whole of S.'s personalty, amounting in the net to 12,748*l.*, was bequeathed to I., a stranger in blood, who was executor. I. took out probate, and paid the duty of ten per cent. on the whole net. Afterwards T., the next of kin to S., disputed the will, on the ground that S. was not of disposing mind. I. paid 6,000*l.* to T., and consented that the will should be revoked, and administration taken out by T., who, in consideration thereof, released to I. her claim on the 12,748*l.* T., from her nearness of blood, was liable to a duty of less than ten per cent. It was held that, under the enactments of this section, I. was entitled to a return of duty, not only on the 6,000*l.*, but also on the remaining 6,748*l.*, and that the duty on the whole 12,748*l.* was to be accounted for between T. and the commissioners of stamps, as duty charged on T., at the lower rate. *Reg. v. The Commissioners of Stamps*, 6 Q. B. 657.

to the public benefit to consolidate and simplify the same, enacts, "That from and after the 10th of October, 1804, all and singular the duties, &c. (aforesaid) shall cease and determine," and imposes the several duties contained in the schedule in lieu thereof.

Legacies charged upon or payment out of the produce of real estate were not subject to the payment of duty until the 45 Geo. 3, c. 28. By that statute duties are imposed "Upon all legacies specific or pecuniary, or of any other description, whether the same be charged upon or payable out of *any real* or personal estate, and upon all residues or shares of personal estate left by any will or testamentary instrument, or divided by force of the statute of distributions, or the custom of any province or place, and upon moneys, or residues, or shares of moneys *arising from the sale of real estates*, by any will or testamentary instrument directed to be sold." And by section 4 it is enacted, "That every gift by any will or testamentary instrument of any person dying after the passing of this act, which, by virtue of any such will or testamentary instrument, shall have effect or be satisfied out of the personal estate of such person so dying, * or out of any personal estate which such persons shall have power to dispose of, as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, (y) or be directed to be satisfied out of any moneys to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity, or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this act. Provided always, That nothing herein contained shall be construed to extend to the charging with the duties by this act granted any specific sum or sums of money, or any share or proportion thereof charged by any marriage settlement or deed or deeds upon any real estate, in any case in which any such specific sum or sums, or share of proportion thereof, shall be appointed or apportioned by any will

45 Geo. 3,
c. 28.

Legacies,
&c. out of
real estate
subject to
duties. (v)

What shall
be deemed
a legacy
under this
act. (x)

Acts shall
not extend
to appoint-
ments by
will under
settle-
ments, &c.

(v) See, also, stat. 8 & 9 Vict. c. 76, s. 4, *post*, 1585.

(z) See stat. 8 & 9 Vict. c. 76, s. 4, *post*, 1586.

(y) See Atty. Gen. v. Pickard, *post*, 1626; Atty. Gen. v. Lord Hertford, *post*,

or testamentary instrument under any power given for that purpose by any such marriage settlement or deed or deeds.”

Sect. 5. “The duties hereby granted upon legacies, or charged upon or made payable out of any real estate, or out of any moneys to arise by the sale of any real estate, or upon residues, or parts or shares of residues of any such moneys, shall be accounted for, answered, and paid by the trustee or trustees to whom the real estate shall be devised, out of which the legacy or legacies, or share or shares, of any money arising out of the sale or mortgage, or other disposition of such real estate, shall be to be paid or satisfied; or if there shall be no trustees, then by the person or persons (z) entitled to such real estate, subject to any such legacy; or by the person or persons empowered or required to pay or satisfy any such legacy; and the said duties shall be retained (a) by the person paying or satisfying any such legacy or share of money, in like manner, and according to * such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are obtained in an act passed in the thirty-sixth year of the reign of his present majesty, intituled, *An act for repealing certain duties on legacies and shares of personal estates, and for granting other duties thereon in certain cases.*”

Duties on legacies charged on real estates shall be paid by the trustees, or the persons entitled to such estate, and retained as under 36 Geo. 3, c. 52.

The statute 48 Geo. 3, c. 149, repealing the duties granted by the last act (except arrears, which are to be recoverable by the same ways and means, &c. in all respects, as if this act had not been made), enacts by sect. 2, “That from and after the 10th of October, 1808, there shall be raised, levied, and paid,” the several duties specified in the schedule; in which schedule, part 3, is contained the following: “For every legacy, &c. given by any will or testamentary instrument of any person who died before or upon the 5th of April, 1805, out of his or her personal or movable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 10th October, 1808,” the several duties, after the rates therein specified. And “for every legacy, &c. &c. of any person who shall have died after the 5th of April, 1805, either out of his or her personal or

(z) See the Atty. Gen. v. Jackson, *post*, 1645.

(a) See Hales v. Freeman, *post*, 1646.

movable estate, or out of or charged upon his or her real or heritable estate, or out of any moneys to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 10th day of October, 1808," the several other duties thereafter specified.

This statute was succeeded by the latest stamp act, 55 Geo. 3, c. 184, which repeals the last mentioned duties, with the same exception of arrears, and imposes the new duties above specified at large. (b)

A fuller and more explicit definition of a legacy is contained
What gifts
are to be
deemed
legacies.
8 & 9 Vict.
c. 76, s. 4. *in the later statute of 8 & 9 Vict. c. 76, s. 4, by which, after reciting that "under or by virtue of the said several recited acts (55 Geo. 3, c. 184, 5 & 6 Vict. c. 82, 8 & 9 Vict. c. 2), certain duties have been granted and are now payable in Great Britain and Ireland respectively upon legacies, and doubts have been entertained whether certain gifts by will or testamentary instrument are legacies liable to the said duties, and it is expedient to remove such doubts," it is enacted, "that from and after the passing of this act, every gift by any will or testamentary instrument of any person, which by virtue of any such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or movable estate or effects of such person, or out of any personal or movable estate or effects which such person hath had or shall have had power to dispose of, or which gift is or shall be payable, or shall have effect or be satisfied out of, or is or shall be charged or rendered a burden upon the real or heritable estate, of such person, or any real or heritable estate, or the rents or profits thereof, which such person hath had or shall have had any right or power to charge, burden, or affect with the payment of money, or out of or upon any moneys to arise by the sale, burden, mortgage, or other disposition of any such real or heritable estate or any part thereof, whether such gift shall be by way of annuity or in any other form, and also every gift which shall have effect as a donation *mortis causa* shall be deemed a legacy within the true intent and meaning of all the several acts granting or relating to duties on legacies in Great Britain and Ireland respectively, and

(b) *Ante*, 1550.

shall be subject and liable to the said duties accordingly. Provided always, that no sum of money, which by any marriage settlement is or shall be subjected to any limited power of appointment to or for the benefit of any person or persons therein specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such person or persons, shall be liable to the said duties or legacies under the will in which such sum is or * shall be appointed or apportioned in exercise of such limited power."

By stat. 16 & 17 Vict. c. 51 (An act for granting to her majesty duties on succession to property, and for altering certain provisions of the acts charging duties on legacies and shares of personal estates), it is enacted by sect. 1, that 16 & 17 Vict. c. 51 (succession duty act). "in the construction and for the purposes of this act,

The term 'real property' shall include all freehold, copyhold, customary, leasehold, and other hereditaments, and heritable property, whether corporeal or incorporeal, in Great Britain and Ireland, except money secured on heritable property in Scotland, and all estates in any such hereditaments: Interpretation of certain terms in this act:

The term 'personal property' shall not include leaseholds, but shall include money payable under any engagement, and money secured on heritable property in Scotland, and all other property not comprised in the preceding definition of real property:

The term 'property' alone shall include real property and personal property:

The term 'succession' shall denote any property chargeable with duty under this act:

The term 'trustee' shall include an executor and administrator, and any person having or taking on himself the administration of property affected by any express or implied trust:

The term 'person' shall include a body corporate, company, and society:

The term 'legacy duty acts' shall denote the acts now in force for charging duties on legacies and shares of the personal estates of deceased persons."

Sect. 2. "Every past or future disposition of property, by reason (c) whereof any person has or shall become beneficially entitled to any property or the income thereof upon What disposition and devo-

(c) As to the construction of these words, see *Wilcox v. Smith*, 4 Drew. 40.

lutions of
property
shall con-
fer succe-
ssions:

* the death of any person dying after the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently, (*d*) and either originally or by way of substitutive limitation and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession;' (*e*) and the definitions of the terms "successor," "predecessor," the term 'successor' shall denote the person so entitled; and the term 'predecessor' (*f*) shall denote settlor, disponent, testator, obligor, ancestor, or other person from whom, the interest of the successor is or shall be derived." (*g*)

Sect. 3. "Where any person shall, at or after the time appointed for the commencement of this act, have any property Joint tenants taking by survivorship to be deemed successors. vested in them jointly, by any title not conferring on them a succession, any beneficial interest in such property accruing to any of them by survivorship shall be deemed to be a succession; and every person to whom any such interest shall accrue shall be deemed to be the successor; and the person upon whose death such accruer shall take place shall be deemed to be the predecessor; and where any persons after the time appointed for the commencement of this act shall take any succession jointly, they shall pay the duty, if * any, chargeable thereon by this act in proportion to their respective interests in the succession; and any beneficial interest in such succession accruing to any of them by survivorship shall be deemed to be a new succession, derived from the predecessor from whom the joint title shall have been derived."

(*d*) As to what person may properly be said to be contingently entitled after an interval, see *Atty. Gen. v. Gell*, 3 H. & C. 615.

(*e*) As to what shall constitute a succession, see *Atty. Gen. v. Yelverton*, 7 H. & N. 306; *Atty. Gen. v. Gardner*, 1 H. & C. 639.

(*f*) As to what constitutes a predecessor, see *In re Jenkinson*, 24 Beav. 64; *Atty. Gen. v. Baker*, 4 H. & N. 19; *In re Ramsay's Settlement*, 30 Beav. 75; *Atty.*

Gen. v. Abdy, 1 H. & C. 266; *Lord Braybrook v. Atty. Gen.* 9 H. L. Cas. 150; *Atty. Gen. v. Floyer*, 9 H. L. Cas. 477; *Atty. Gen. v. Smythe*, 9 H. L. Cas. 497; *Lord Saltoun v. Lord Advocate*, 3 Macq. H. of L. 659; *In re De Lancey*, L. R. 4 Ex. 345; *Atty. Gen. v. Cecil*, L. R. 5 Ex. 263; *Atty. Gen. v. Littledale*, L. R. 5 Ex. 275.

(*g*) The general plan of the act is expounded by Lord Justice Turner in *Oldfield v. Preston*, 3 De G., F. & J. 416.

Sect. 4. "Where any person shall have a general power of appointment, under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of this act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect, upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor." (*h*)

General powers of appointment to confer successions:

* Sect. 5. "Where any property shall, at or after the time appointed for the commencement of this act, be subject to any charge, estate, or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person or persons upon the extinction or determination of such charge, estate, or interest, shall be deemed to be a succession accruing to the person, or the persons, if more than one, then entitled beneficially to the property or the income thereof, according to his or their respective estates or interests therein, or beneficial enjoyment thereof; and the person or persons from whom such successor or successors respectively shall have derived title

Extinction of determinable charges to confer successions.

(*h*) This section does not restrict the operation of the duty as regards appointments to cases where the powers are created by wills taking effect, or by settlements made, after the commencement of the act. In *re Lovelace*, 4 De G. & J. 340. The rule settled by this case, together with *Re Wallop's case*, 1 De G., J. & Sm. 656, is that where a general power is given and exercised, the appointee is a person taking in succession to the appointor, and the appointor is also a successor to the donor of the power. 2 Hemm. & M. 450, per Wood V. C. But see, *contra*, In *re Barker*, 7 H. & N. 109, where it appears to have been held that the appointee was liable as on a succession derived from the

donor of the power. But see the *Atty. Gen. v. Upton*, L. R. 1 Ex. 224. Where A., having a general power of appointment subject to a life interest in his sister B., appointed by will to C. for life, with remainder to such persons as B. should appoint; and A. died, and then B. died in C.'s lifetime having appointed to strangers; and then C. died; it was held that B.'s appointees were liable to 10l. per cent. legacy duty, but that the fund was not liable to succession duty in respect of the succession to A., by reason of the exemption in the 14th section, having regard to the principle indicated by the 16th section. In *re Chapman's Trusts*, 2 Hemm. & M. 447.

to the property so charged shall be deemed to be the predecessor or predecessors, as the case may be."

Persons
now bene-
ficially en-
titled to
real prop-
erty sub-
ject to
leases for
life, not
liable to
duty.

Sect. 6. "Provided, that no person entitled, at the time appointed for the commencement of this act, to the immediate reversion in any real property expectant upon the determination of any lease for life or for years determinable on life, shall be chargeable with duty in respect of such determination, in the event of the same occurring in his lifetime."

Disposi-
tions ac-
companied
by the
reservation
of a bene-
fit to the
grantor,
&c. to con-
fer succes-
sions.

Sect. 7. "Where any disposition of property, not being a *bonâ fide* sale, and not conferring an interest expectant on death on the person in whose favor the same shall be made, shall be accompanied by the reservation or assurance of or contract for any benefit to the grantor, or any other person, for any term of life or for any period ascertainable only by reference to death, such disposition shall be deemed to confer at the time appointed for the determination of such benefit an increase of beneficial interest in such property, as a succession equal in annual value to the yearly amount or yearly value of the benefit so reserved, assured, or contracted for, on the person in whose favor such disposition shall be made."

Disposi-
tions to
take effect
at periods
depending
on death,
or made for
evading
duty, to
confer suc-
cessions.

Sect. 8. "Where any disposition of property shall be made to take effect at a period ascertainable only by reference to * the date of the death of any person dying after the time appointed for the commencement of this act, such disposition shall be deemed to confer a succession on the person in whose favor the same shall be made; and where any disposition of property shall purport to take effect presently or under such circumstances as not to confer a succession, but by the effect or in consequence of any engagement, secret trust, or arrangement capable of being enforced in a court of law or equity, the beneficial ownership of such property shall not *bonâ fide* pass according to such disposition, but shall in fact devolve to any person on death, or at some period ascertainable only by reference to death, then such last mentioned person shall be deemed to acquire the property so passing as a succession derived from the person making the disposition as the predecessor; and where any court of competent jurisdiction shall

declare any disposition to have been fraudulent and made for the purpose of evading the duty imposed by this act, it shall be lawful for such court to declare a succession to have been conferred on such person at such time and to such an extent as such court shall think just ; and such last mentioned person shall be deemed to have taken a succession accordingly derived from the person making such disposition as predecessor."

Sect. 9. "The duties hereinafter imposed shall be considered as stamp duties, and shall be under the care and management of the commissioners of inland revenue, hereinafter called 'The Commissioners;' who, by themselves and their officers, shall have the same powers and authorities for the collection, recovery, and management thereof, as are by an act passed in the session holden in the twelfth and thirteenth years of the reign of her present majesty, chapter one, or by any other act or acts, vested in them for the collection, recovery, and management of any stamp duties ; and shall provide proper stamps for denoting the rate *per centum* of the duties payable under this act ; and shall have all other powers *and authorities requisite for carrying this act into execution."

Duties to be under the care and management of the commissioners of inland revenue.

Sect. 10. "There shall be levied and paid to her majesty in respect of every such succession as aforesaid, according to the value thereof, the following duties (that is to say):

Duties on successions.

Where the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of one pound *per centum* upon such value :

Where the successor shall be a brother or sister, or a descendant of a brother or sister of the predecessor, a duty at the rate of three pounds *per centum* upon such value :

Where the successor shall be a brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother of the predecessor, a duty at the rate of five pounds *per centum* upon such value :

Where the successor shall be a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the predecessor, a duty at the rate of six pounds *per centum* upon such value :

Where the successor shall be in any other degree of collateral

consanguinity to the predecessor than is hereinbefore described, or shall be a stranger in blood to him, a duty at the rate of ten pounds *per centum* upon such value."

Provision as to married persons chargeable with succession or legacy duties. Sect. 11. "Where any person chargeable with duty under this act in respect of any succession, or chargeable with duty under the legacy duty acts in respect of any legacy bequeathed to him or her by a testator dying after the time appointed for the commencement of this act, or in respect of the personal estate of any person dying after the same period, shall have been married to any wife or husband of nearer consanguinity than himself or herself to the predecessor, testator, or deceased person, then the person taking such succession, legacy, or personal estate shall pay in respect thereof the same rate of duty only as such his or her wife or * husband would have been chargeable with if she or he had taken the same."

What duties payable when the successor is also the predecessor. Sect. 12. "Where any person shall take a succession under a disposition made by himself, then, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this act, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession, at the same rate as he would have been chargeable with if no such disposition had been made; but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself, and no person shall be chargeable with duty upon the extinction or determination of any charge, estate, or interest created by himself, unless at the date of the creation thereof he shall have been entitled to the property subjected thereto expectantly on the death of some person dying after the time appointed for the commencement of this act." (i)

Provision as to joint predecessors. Sect. 13. "Where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the commissioners to

(i) See, as to the construction of this section, *Atty. Gen. v. Sibthorp*, 3 H. & N. 488; 9 H. L. Cas. 450; *Atty. Gen. v. Gardner*, 1 H. & C. 639; *Atty. Gen. v. Cecil*, L. R. 5 Ex. 263.

agree with the successor as to the duty payable ; but if no such agreement shall be made, the successor shall be deemed to have derived his succession in equal proportions from each predecessor, and shall be chargeable with duty accordingly.” (*k*)

Sect. 14. “ Where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor or successors, then one duty only shall be *paid in respect of such interest, and shall be due from the successor who shall first become entitled thereto in possession ; but such duty shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them.”

Duty on transmitted successions.

Sect. 15. “ Where, at the time appointed for the commencement of this act, any reversionary property expectant on death shall be vested, by alienation or other derivative title, in any person other than the person who shall have been originally entitled thereto under any such disposition or devolution as is mentioned in the second section of this act, then the person in whom such property shall be so vested shall be chargeable with duty in respect thereof as a succession at the same time and at the same rate as the person so originally entitled would have been chargeable with if no such alienation had been made or derivative title created ; and where, after the time appointed for the commencement of this act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created ; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interests, then the duty thereon shall be payable at the same time and in the same manner as such duty would have been payable if no such acceleration had taken place.” (*l*)

Duties payable in respect of transferred interests.

(*k*) As to the construction of this section, see *Atty. Gen. v. Gardner*, 1 H. & C. 639 ; *Atty. Gen. v. Rushton*, 2 H. & C. 812 ; *Atty. Gen. v. Cecil*, L. R. 5 Ex. 263 ; 19.

(*l*) As to the construction of this section, see *Atty. Gen. v. Little Dale*, L. R. 5 Ex. 275.

Sect. 16. “Where property shall become subject to a trust for any charitable or public purposes, under any past or future disposition, which, if made in favor of an individual, would confer on him a succession, there shall be payable in * respect of such property, upon its becoming subject to such trusts, a duty at the rate of ten pounds *per centum* upon the amount or principal value of such property; and it shall be lawful for the trustee of any such property to raise the amount of any duty due in respect thereof, with all reasonable expenses, upon the security of the charity property, at interest, with power for him to give effectual discharges for the money so raised.”

Sect. 17. “No policy of insurance on the life of any person shall create the relation of predecessor and successor between the insurers and the assured, or between the insurers and any assignee of the assured, and no bond or contract made by any person *bonâ fide* for valuable consideration in money or money’s worth, for the payment of money or money’s worth after the death of any other person, shall create the relation of predecessor and successor between the person making such bond or contract and the person to or with whom the same shall be made; but any disposition or devolution of the moneys payable under such policy, bond, or contract, if otherwise such as in itself to create a succession within the provisions of this act, shall be deemed to confer a succession.” (m)

Sect. 18. “Where the whole succession or successions derived from the same predecessor, and passing upon any death to any person or persons, shall not amount in money or principal value to the sum of one hundred pounds, no duty shall be payable under this act in respect thereof or of any portion thereof; and no duty shall be payable under this act upon any succession, which, as estimated according to the provisions of this act, shall be of less value than twenty pounds in the whole, or upon any moneys applied to the payment * of the duty on any succession according to any trust for that purpose, or by any per-

(m) This section is not confined to cases where the relation of debtor and creditor exist between the parties, but extends to every case of a contract *bonâ fide* for valuable consideration in money or money’s worth for the payment of money or money’s worth after the death of another person. *Oldfield v. Preston*, 3 De G., F. & J. 398.

son in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted (*n*) from the payment of duty in respect thereof under the legacy duty acts; and no person shall be charged with duty under this act in respect of any interest surrendered by him or extinguished before the time appointed for the commencement of this act; and no person charged with the duties on legacies and shares of personal estate under the legacy duty acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this act in respect of the same acquisition of the same property." (*o*)

Sect. 19. "No legatee or other person shall, after the time appointed for the commencement of this act, be chargeable under the legacy acts with duty, not then already due, in respect of any leasehold hereditaments of any testator or deceased person, as belonging to the personal estate of the testator or deceased."

Leasehold estates not to be charged with legacy duty as personal estate.

Sect. 20. "The duty imposed by this act shall be paid at the time when the successor or any person in his right or on his behalf, shall become entitled in possession to his succession, or to the receipt of the income and profits thereof; except that if there shall be any prior charge, estate, or interest, not created by the successor himself, upon or in the succession, by reason whereof the successor shall not be presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate or interest shall, if not previously paid, compounded for, or commuted, be paid at * the time of such determination; and except that in case of an annuity or property hereby made chargeable as an annuity, the duties shall be paid by such instalments as are hereinafter directed or referred to; provided that no duty shall be payable upon the determination of any lease purporting at the

Duties to be paid on the successor becoming entitled in possession, but in the case of outstanding interests, on the determination thereof.

(*n*) The exemptions here referred to are the special exemptions given by the legacy duty acts, and the section does not extend to cases where no duty was imposed by those acts; in effect, the word "exempted" must be construed in its legal sense, and not as meaning "free

from." *Atty. Gen. v. Fitzjohn*, 2 H. & N. 465; *In re Wallop's Trusts*, 1 De G., J. & Sm. 656, 672.

(*o*) See *Earl Howe v. Earl of Lichfield*, L. R. 1 Eq. 641; *Atty. Gen. v. Littledale*, L. R. 5 Ex. 275.

date thereof to be a lease at rack-rent, in respect of the increase accruing to the successor upon such determination."

Sect. 21. "The interest of every successor, except as herein provided, in real property, shall be considered to be of the value of an annuity equal to the annual value of such property, (*p*) after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto; and every such annuity, for the purposes of this act, shall be valued according to the tables in the schedule annexed to this act; and the duty chargeable thereon shall be paid by eight equal half-yearly instalments, the first of such instalments to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, and the seven following instalments at half-yearly intervals of six months each, to be computed from the day on which the first instalment shall have become due, provided that if the successor shall die before all such instalments shall have become due, then any instalments not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the instalments unpaid at his death shall be a continuing charge on such interest, in exoneration of his other property, *and shall be payable by the owner for the time being of such interest." (*q*)

Sect. 22. "In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rentcharges, and other property yielding or capable of yielding income not of a fluctuating character, an allowance shall be made of all necessary outgoings." (*r*)

(*p*) As to the meaning of the words "annual value of such property," see *Atty. Gen. v. Lord Sefton*, 2 H. & C. 362; 11 H. L. Cas. 257.

(*q*) It has been held that the word "competent" in this section means to refer to the successor's interest in the property, and not to his understanding. *Atty.*

Gen. v. Hallett, 2 H. & N. 368. The case is within the exception engrafted on the proviso, notwithstanding the successor becomes competent by his own act after the time of his becoming successor. *Atty. Gen. v. Lord Lilford*, 3 H. & C. 239, *dis-sentiente* Pollock C. B.

(*r*) The successor is not entitled, under

Sect. 23. "Where timber, trees, or wood, not being coppice or underwood, shall be comprised in any succession, the successor shall be chargeable with duty upon his interest Rule as to timber. in the net moneys, after deducting all necessary outgoings for the year, which shall from time to time be received from any sales of such timber, trees, or wood, and shall account for and pay the same yearly; provided that no duty shall be payable on the net moneys received from the sale of timber, trees, or wood in any one year unless such net moneys shall exceed the sum of ten pounds; provided, that if the successor shall be desirous of commuting the duty, and shall deliver to the commissioners an estimate of the net moneys obtainable by him from the sale of such timber, trees, and wood as may, in a prudent course of management of the property, be felled by such successor during his life, the commissioners, if satisfied with such estimate, shall accept the same and assess the duty accordingly."

Sect. 24. "A successor shall not be chargeable with duty in respect of any advowson or church patronage comprised in his succession, unless the same, or some right of presentation, or some other interest in or out of such advowson, * or church patronage, shall be disposed of by or in concert with him for money or money's worth, in which case he shall be chargeable with duty upon the amount or value of the money or money's worth for which the same, or any such presentation or interest, shall be so disposed of at the time of such disposal." Rule as to advowson.

Sect. 25. "Where a successor, entitled to any real property, subject to any lease by reason whereof he shall not be presently entitled to the full enjoyment thereof, shall not have paid duty in respect of the full yearly value of such property, he shall be chargeable with duty upon his interest in any fine or grassum or other consideration which may be received during his life for the renewal of any such lease, or the grant of any reversionary lease of the same property." Rule as to property subject to beneficial leases.

Sect. 26. "The yearly value of any manor, opened mine, or other real property of a fluctuating yearly income shall either be calculated upon the average profits or income Rule as to manors, mines, &c. derived therefrom, after deducting all necessary outgoings, during such a number of preceding years as shall be agreed upon for this

this section, to a deduction for income tax or the agent's charge for collecting rents. In re Elwes, 3 H. & N. 719.

purpose between the commissioners and the successor, before the first payment of duty on the succession shall have become due ; or if no such period shall be agreed upon, then the principal value of such property shall be ascertained, and the annual value thereof shall be considered to be equal to interest calculated at the rate of three pounds *per centum per annum* on the amount of such principal value."

Sect. 27. "Where any body corporate, company, or society shall become entitled, as successors, to any real property, the duty in respect thereof shall be assessed upon the principal value of such property, but shall be payable by such instalments, at such times, and in such manner as the same would be payable if assessed in respect of property devolving on a successor in fee simple ; and it shall be lawful for such body corporate, company, or society, or any trustee thereof, to raise the amount of any duty in due respect of their succession * upon the security thereof, at interest, with power for them to give effectual discharges for the money so raised."

Sect. 28. "If a successor, or any person on his behalf, upon becoming entitled to any copyhold or other real property, shall be subject to any fines, casualties of superiority, compositions, reliefs, or charges incident to the tenure thereof, and due in respect of his succession, he shall be entitled to have a deduction allowed to him of the amount of such fines, casualties, compositions, reliefs, or charges from the assessable value of his interest in such copyhold or other real property."

Sect. 29. "The interest of any successor in moneys to arise from the sale of real property under any trust for the sale thereof, so far as the same shall not be chargeable with duty under the legacy duty acts, shall be deemed to be personal property chargeable with duty under this act ; provided that where such moneys shall be subject to any trust for the reinvestment thereof in the purchase of other real property, to which the successor would not be absolutely entitled, such moneys shall be deemed to be real property, and for the purpose of this act each successor's interest therein shall be considered to be of the value of an annuity, payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall then

be the real property subject to the trust or direction for sale, or any property purchased in substitution for it, or any intermediate investment of the produce of the sale of the original property."

Sect. 30. "The interest of any successor in personal property subject to any trust for the investment thereof in the purchase of real property to which the successor would be absolutely entitled shall, so far as the same shall not be chargeable with duty under the legacy duty acts, be chargeable with duty under this act as personal property; and personal property subject to any trust for the investment * thereof in the purchase of real property to which the successor would not be absolutely entitled shall, so far as the same shall not be chargeable with duty under the legacy duty acts, be chargeable with duty under this act as real property; and for the purposes of this act each successor's interest therein shall be considered to be of the value of an annuity, payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall be the real property directed to be purchased, or any intermediate investment of the personal property directed to be invested in such purchase."

Personal property to be invested in real property, how to be charged.

Sect. 31. "Where it shall be required to calculate, for the purposes either of this act or of the legacy duty acts, the value of any annuity, or of any interest chargeable with duty as an annuity, such value shall, after the time appointed for the commencement of this act, be calculated according to the tables in the schedule annexed to this act, and not according to the tables in the schedule annexed to the act of the thirty-sixth year of the reign of King George the Third, chapter fifty-two, and such annuity or interest shall be chargeable with duty accordingly."

Annuities under this act and the legacy duty acts to be valued according to the tables annexed to this act.

Sect. 32. "The following provisions relating to the assessment and payment of duty on personal estate, and the exemption thereof from duty in certain cases, namely, the eighth, tenth, eleventh, twelfth, fourteenth, and twenty-third sections of the said act of the thirty-sixth year of the reign of King George the Third, chapter fifty-two, shall be applicable to the personal property comprised in any succession, and to the assessment and payment of duty thereon, as if such

Provisions as to the assessment of personalty.

personal property were a legacy bequeathed by the predecessor to the successor, and were subject to the said provisions, and as if the tables in the said act referred to were the tables in the schedules annexed to this act."

Sect. 33. "Where the donee of a general power of appointment shall become chargeable with duty in respect of the * property appointed by him under such power, he shall be allowed to deduct from the duty so payable any duty he may have already paid in respect of any limited interest taken by him in such property."

Allowance to donee of general power of appointment.

Sect. 34. "In estimating the value of a succession no allowance shall be made in respect of any incumbrance thereon created or incurred by the successor, not made in execution of a prior special power of appointment, but an allowance shall be made in respect of all other incumbrances, and also in respect of any moneys which the successor may previously to his possession have laid out in the substantial repairs or permanent improvement of real property comprised in his succession; provided that upon any successor becoming entitled to real property subject to any prior principal charge, an allowance shall be made to him in respect only of the yearly sums payable by way of interest or otherwise on such charge as reducing the annual value *pro tanto* of such real property." (s)

What allowance to be made for incumbrances.

Sect. 35. "In estimating the value of a succession no allowance shall be made in respect of any contingent incumbrance thereon; but in the event of such incumbrance taking effect as an actual burden on the interest of the successor, he shall be entitled to a return of a proportionate amount of the duty so paid by him in respect of the amount or value of the incumbrance when taking effect."

No allowance to be made in respect of contingent incumbrances, unless they take effect.

Sect. 36. "In estimating the value of a succession no allowance shall be made in respect of any contingency upon the happening of which the property may pass to some other person; but in the event of the same so passing the successor shall be entitled to a return of so much of the duty paid by him as will reduce the same to the amount which would have been payable by him if such duty had been assessed in respect of the actual duration or extent of his interest."

The duty on successions to be calculated without regard to contingencies.

(s) See, as to the construction of this section, *In re Peyton*, 7 H. & N. 265.

*Sect. 37. "Where a successor shall not have obtained the whole of his succession at the time of the duty becoming payable, he shall be chargeable only with duty on the value of the property or benefit from time to time obtained by him; and whenever any duty shall have been paid on account of any succession, and it shall afterwards be proved to the satisfaction of the commissioners that such duty, not being due from the person paying the same, was paid by mistake, or was paid in respect of property which the successor shall have been unable to recover, or from or of which he shall have been evicted or deprived by any superior title, or that for any other reason it ought to be refunded, the commissioners shall thereupon refund the same to the person entitled thereto."

Provision
for allow-
ance or re-
turn of
duty.

Sect. 38. "Where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, the commissioners shall, upon the computation of the assessable value of his succession, make such an allowance to him as may be just in respect of the value of such property." (t)

Allowance
to be made
to succes-
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property.

Sect. 39. "Where, in the opinion of the commissioners, any succession shall be of such a nature, or so disposed or circumstanced, that the value thereof shall not be fairly ascertainable under any of the preceding directions, or where, from the complication of circumstances affecting the value of a succession, or affecting the assessment or recovery of the duty thereon, the commissioners shall think it expedient to exercise this present authority, it shall be lawful for them to compound the duty payable on the succession upon such terms as they shall think fit, and to give discharges to the successor, upon payment of duty according to such composition; and it shall be lawful for them, in any special cases in which they may think it expedient so to do, to enlarge the time for payment of any duty."

Power for
commis-
sioners to
compound
duties.

*Sect. 40. "It shall be lawful for the commissioners to receive any duty tendered to them in advance, and to allow discount thereon at the rate of four pounds *per centum per annum*, or at such other rate as may from time to time be directed by the commissioners of her majesty's

Power of
commis-
sioners to
receive
duty in
advance.

(t) Atty. Gen. v. Sibthorp, 3 H. & N. exchequer, 5 H. & N. 488; In re Peyton, 424; Lord Braybrooke v. Atty. Gen. 9 H. 7 H. & N. 265. L. Cas. 150; reversing the decision of the

treasury; and no person, by reason of his having made any payment of duty in advance, shall be prejudiced in his right to have any repayment of duty made to him to which he may become entitled under any of the provisions of this act."

Sect. 41. "It shall be lawful for the commissioners, in their discretion, upon application made by any person who shall be entitled to a succession in expectancy, to commute the duty presumptively payable in respect of such succession for a certain sum to be presently paid, and for assessing the amount which shall be so payable they shall cause a present value to be set upon such presumptive duty, regard being had to the contingencies affecting the liability to such duty, and the interest of money involved in such calculation being reckoned at the rate for the time being allowed by the commissioners in respect of duties paid in advance; and upon the receipt of such certain sum they shall give discharges to the successor accordingly."

Sect. 42. "The duty imposed by this act shall be a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed; and such duty shall also be a first charge on the interest of the successor in the personal property in respect whereof the same shall be assessed, while the same shall remain in the ownership or control of the successor, or of any trustee for him, or of his guardian or committee, or tutor or curator, or of the husband of any wife who shall be the successor; and the said duty shall be a debt due to the crown from the successor, having in the case of real property comprised in any succession, priority over all charges and interests created by him, but such duty shall not charge or affect any other real property of the successor than the property comprised in such succession; * provided that where any settled real property comprised in a succession shall be subject to any power of sale, exchange, or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he shall not be disqualified by the charge of duty on his succession from effectually authorizing by his consent the exercise of such power, or exercising any power with proper consent, as the case may be, and in such case the duty shall be charged substitutively upon the successor's interest in all real property acquired in substitution

for the real property before comprised in the succession, and in the meantime upon his interest also in all moneys arising from the exercise of any such power, and in all investments of such moneys."

Sect. 43. "The commissioners shall, at the request of any successor, or any person claiming in his right, accept or cause to be made so many separate assessments of the duty payable in respect of the interest of the successor in any separate properties, or in defined portions of the same property, as shall be reasonably required; and in such cases the respective properties shall be chargeable only with the amount of duty separately assessed in respect thereof; and it shall be lawful also for the commissioners, by their certificates, to be issued in such form as they shall think fit, from time to time to declare that any duties already assessed, whether collectively or distributively, in respect of any succession, shall thenceforth be charged, as to any unpaid instalments, according to any further distribution thereof, upon separate parts only of the property in respect of which such assessment shall have been made, in which case the charge of such duties shall be thenceforth limited according to such further distribution."

Provision
for the sep-
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sessments
of proper-
ties.

Sect. 44. "The following persons, besides the successor, shall be personally accountable to her majesty for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively after the time appointed for the commencement * of this act; that is to say, every trustee, guardian, committee, tutor, or curator, or husband in whom respectively any property, or the management of any property, subject to such duty, shall be vested, and every person in whom the same shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession; and all such trustees, guardians, committees, tutors, curators, husbands, and persons shall be authorized to compound or pay in advance or commute any duty, and retain out of the property subject to any such duty the amount thereof, or to raise such amount, and the expenses incident thereto, at interest on the security of such property, with power to give effectual discharges for the same, and such security shall have priority over any charge or incumbrance created by the successor; and in the event of the non-payment of

What per-
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for duty.

such duty as aforesaid every person hereby made accountable shall be a debtor to her majesty in the amount of the unpaid duty for which he shall be so accountable."

Sect. 45. "The persons hereby made accountable for the payment of duty in respect of any succession, or some of them, shall, in the case of personal property, at the time of the first payment, delivery, retainer, satisfaction, or other discharge of the same or any part thereof to or for the successor or any person in his right, and in the case of real property when any duty in respect thereof shall first become payable, give notice to the commissioners or to their officers of their liability to such duty, and shall at the same time deliver to the commissioners or to their officers a full and true account of the property for the duty whereon they shall respectively be accountable, and of the value thereof, and of the deductions claimed by them, together with the names of the successor and predecessor, and their relation to each other, and all such other particulars as shall be necessary or proper for enabling the commissioners fully and correctly to ascertain the duties due; and the commissioners, if satisfied with such account and estimate as originally delivered, or with any amendments that may be made therein upon * their requisition, may assess the succession duty on the footing of such account and estimate; but it shall be lawful for the commissioners, if dissatisfied with such account and estimate, to cause an account and estimate to be taken by any person or persons to be appointed by themselves for that purpose, and to assess the duty on the footing of such last mentioned account and estimate, subject to appeal, as hereinafter provided; and if the duty so assessed shall exceed the duty assessable according to the return made to the commissioners, and with which they shall have been dissatisfied, and if there shall be no appeal against such assessment, then it shall be in the discretion of the commissioners, having regard to the merits of each case, to charge the whole or any part of the expenses incident to the taking of such last mentioned account and estimate on the interest of the successor, in respect whereof the duty shall be due, in increase of such duty, and to recover the same forthwith accordingly; and if there shall be an appeal against such last mentioned assessment, then the payment of such expenses shall be in the discretion of the court of appeal hereinafter appointed."

Notice of succession to be given to the commissioners and a return of the property made.

Sect. 46. "If any person required to give any such notice or deliver such account as aforesaid, shall wilfully neglect to do so at the prescribed period, he shall be liable to pay to her majesty a sum equal to ten pounds *per centum* upon the amount of duty payable by him, or in the case of a succession chargeable with a higher rate of duty than one pound *per centum* upon the value thereof, upon such less sum as such duty, if assessable at the rate of one pound *per centum* upon the value of the succession, would amount to, and a like penalty for every month after the first month during which such neglect shall continue; and if any person liable under this act to pay any duty shall, after such duty shall have been finally ascertained, wilfully neglect to do so within twenty-one days, he shall also be liable to pay to her majesty a sum equal to ten pounds *per centum* upon the amount of duty so unpaid, or upon such less sum as such duty, if * assessable at the rate of one pound *per centum* on the value of the succession, would amount to, and a like penalty for every month after the first month during which such neglect shall continue."

Penalty on
not giving
notices of
succession.

Sect. 49. "Every person who under the provisions of this act may deliver any account or estimate of the property comprised in any succession shall, if required by the commissioners, produce before them such books and documents in the custody or control of such person, so far as the same relate to such account or estimate, as may be capable of affording any necessary information for the purpose of ascertaining such property and the duty payable thereon; and the commissioners may, without payment of any fee, inspect and take copies of any public book; but all such information shall be deemed to be confidential, and the commissioners shall not disclose the same, or the contents of any document or book, to any person, otherwise than for the purposes of this act."

Account-
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of public
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Sect. 50. "It shall be lawful for any accountable party dissatisfied with the assessment of the commissioners, upon giving, within twenty-one days after the date of such assessment, notice in writing to the commissioners of his intention to appeal against such assessment, and a statement of the grounds of such appeal, such statement to be furnished within the further period of thirty days, to appeal by petition accordingly to her majesty's court of exchequer in England, Scotland, or Ireland,

Power for
account-
able party
to appeal.

according to the place in which the appellant shall be resident; and every such court, or any judge thereof sitting in chambers, shall have jurisdiction to hear and determine the matter of such appeal and the costs thereof, with power to direct, for the purposes of such appeal, any inquiry, valuation, or report to be made by any officer of the court, or other person, as such court or judge may think fit. Provided, that where the sum in dispute in respect of duty on such assessment does not exceed fifty pounds, the accountable party may, having given notice of appeal and delivered a statement of the grounds thereof * as hereinbefore directed, appeal to the judge of the county court in England, the sheriff court in Scotland, or the assistant barrister's court in Ireland, for the district, county, or division in which the appellant shall be resident, or the property be situate; and every such judge shall have jurisdiction to hear and determine the matter of such last mentioned appeal, with the like power and authority as are by this section given to a judge of her majesty court of exchequer." (u)

Duty to be entered by the commissioners in a book, and a stamped receipt to be given. Sect. 51. "Whenever any payment of duty shall be made under this act, the same shall be entered in a book to be kept by the commissioners for this purpose, and the receiver general of inland revenue, or other proper officer appointed by the commissioners, shall give a receipt for the same in such form as they shall think fit, and stamped with the proper stamp for denoting the rate of duty, and the commissioners shall from time to time deliver to any person interested in any property affected by such duty, on applying for the same for any reasonable purpose approved by the commissioners, a certificate, in such form as they may think fit, of such payment." (v)

Protection to *bonâ fide* purchasers. Sect. 52. "Every receipt and certificate purporting to be in discharge of the whole duty payable for the time being in respect of any succession or any part thereof shall exonerate a *bonâ fide* purchaser for valuable consideration, and without notice, from such duty, notwithstanding any suppression or misstatement in the account upon the footing whereof the

(u) An appeal is given from the decision of the court or judge to the exchequer chamber, and then to the house of lords, by stat. 28 & 29 Vict. c. 104, s. 59.

(v) See *Earl Howe v. Earl of Lichfield*, L. R. 1 Eq. 641.

same may have been assessed, or any insufficiency of such assessment; and no *bonâ fide* purchaser of property for valuable consideration under a title not appearing to confer a succession shall be subject to any duty with which such property may be chargeable under the provisions of this act, by reason of any extrinsic circumstances * of which he shall not have had notice at the time of such purchase."

Sect. 53. "Whenever any suit shall be pending in any court for the administration of any property chargeable with duty under this act, or the legacy duty acts, such court shall provide, out of any property which may be in the possession or control of the court, for the payment of duty to the commissioners."

Courts in suits for the administration of property to provide for payment of duty.

Sect. 54. "This act shall be taken to have come into operation on the 19th day of May, 1853, and shall take effect accordingly."

Commencement of act.

Sect. 55. "This act may be cited for all purposes as 'the succession duty act, 1853.'"

Short title.

By stat. 28 & 29 Vict. c. 104, sections 47 and 48 of the 16 & 17 Vict. c. 51 (succession duty act), and the 1st section of the stat. 24 & 25 Vict. c. 92 are repealed, and by sect. 55 it is enacted, "If any person accountable and chargeable with duty under the succession duty act or the legacy duty acts required by the commissioners of inland revenue to deliver an account under those acts or any of them makes default in doing so, the commissioners may sue out of the court of exchequer a writ of summons commanding him to deliver an account, and to pay the duty and the costs of the proceedings, or to show cause to the contrary, and on cause being shown, such order shall be made as seems just."

Stat. 28 & 29 Vict. c. 104, s. 55, for summary proceedings for account and payment of succession and legacy duty.

And by sect. 56, "where, in pursuance of the succession duty act or the legacy duty acts, the commissioners of inland revenue make an assessment of duty, and the duty is not paid, and there is no notice of appeal against the assessment under sect. 50 of the succession duty act (see *ante*, 1608), or of disputing the liability to assessment, the commissioners may sue out of the court of exchequer a writ of summons commanding the person liable for the duty, or the owner of any property expressly charged therewith, to pay the duty payable by him and the costs of the proceedings, or to

Sect. 56. Summary proceedings for payment of succession or legacy duty assessed.

show cause to the contrary, and on cause being shown, such order shall be made as seems just."

* By sect. 58, in such proceedings the court may refer the matter to the proper officer for his report, and may therefore order a special case, and may give judgment thereon subject to proceedings in error.

By sects. 59 and 60, in such proceedings by writ of summons an appeal is given to the exchequer chamber, and thence to the house of lords. (x)

Having thus collected the principal statutory provisions now in force with respect to duties on legacies and successions, it remains to point out, more fully, the construction which has been put on these acts by the courts of law and equity. And for this purpose, it is proposed to consider, 1st, the amount of duties payable; 2dly, on what subjects the duties are payable; 3dly, by whom the duties are payable.

(x) See, also, stat. 22 & 23 Vict. c. 21, s. 15.

[1611]

* CHAPTER THE FIRST.

AS TO THE AMOUNT OF DUTIES PAYABLE ON LEGACIES AND SUCCESSIONS.

It will be observed, that by the latest stamp act (55 Geo. 3, c. 184), the present rates of duties are respectively imposed only on legacies, in cases where the testator or intestate died before or on the 5th of April, 1805, and the legacies or residue shall be paid, delivered, retained, satisfied, or discharged, *after* the 31st of August, 1815, and on legacies and successions, in cases where the testator or intestate died after the 5th day of April, 1805, and the legacies, &c. shall be paid, delivered, retained, or discharged, *after* the 31st of August, 1815. And the preceding stamp act (48 Geo. 3, c. 149), contained a similar provision, *mutatis mutandis*, with respect to the dates of the 5th of April, 1805, and the 10th of October, 1808.

What shall be considered a legacy paid, &c. before 31st August, 1815.

It is therefore material to ascertain, under what circumstances a legacy shall be said to be “paid, delivered, retained, satisfied, or discharged,” within the meaning of the statute.

In *The Attorney General v. Manners*, (a) Lord William Manners, who died in the year 1771, bequeathed the sum of 13,000*l.* to his executors, in trust to place the same out at interest, and pay the proceeds to his natural son, Thomas Manners, for his life, and after his decease to pay one moiety to the eldest son of of the said Thomas Manners, and the other moiety to his younger children. In the year 1794, the executors invested the money in the funds in their own names, and the interest was duly paid to Thomas Manners *till his death in 1812. The question was, whether the legacy to his children was subject to a duty of 8*l.* per cent. imposed by the statute of 48 Geo. 3, c. 149. And the court of exchequer held in the affirmative, as being a legacy given by will of a person dying before the 5th of April, 1805, and not

(a) 1 Price, 411.

paid, retained, satisfied, or discharged, till after the 10th of October, 1808. So, in the case of the Attorney General *v.* Wood, (*b*) William Coombes, who died in 1794, bequeathed a legacy, in consolidated stock, to executors, in trust to pay the interest to Ann Buckland for life; remainder, after her decease, to her surviving children, on their attaining twenty-one; remainder, if no surviving children, to her appointees; remainder, in default of appointment to her next of kin. Upon the testator's death, the executors transferred the legacies into their own names from that of the testator, paid his debts, and accounted for the residuary estate to the residuary legatee. The dividends were regularly paid by the executors to Ann Buckland until 1826, when she died, leaving three children. And the court of exchequer held that the transfer did not amount to a payment, delivery, retainer, satisfaction, or discharge of the legacy, before the 31st of August, 1815; and that it was therefore liable to the duty under the 55 Geo. 3, c. 184.

But in *Hill v. Atkinson*, (*c*) the sum of 3,000*l.* was given by will to trustees, who were also appointed executors, upon trust to invest and pay the interest to Ann Atkinson for life, and, after her death to apply the same to the maintenance of the child of which she was then *enceinte*, and to transfer the principal to such child, on attaining twenty-one; but in case it should die under twenty-one, then to Tabitha Leake, her executors, &c. The testator died in 1776. Ann Atkinson never was with child; and under a decree, the 3,000*l.* was, in the year 1779, paid by the trustees into court, and invested in stock, in the name * of the accountant general, Tabitha Leake being then an infant. And Lord Eldon determined that the executors, by paying in the money under the decree of the court, effected a sufficient appropriation of the legacy to be within the words of the act of 48 Geo. 3, c. 149, "paid, retained, satisfied, or discharged," before the 10th of October, 1808; and therefore, upon a question arising at the time of the principal becoming payable, his lordship determined that no legacy duty was chargeable in respect of it.

In this case of *Hill v. Atkinson*, Lord Eldon observed, (*d*) that the ground of the decision of *The Attorney General v. Manners* must have been, that the barons were of opinion that an execu-

(*b*) 2 Y. & Jerv. 290.

(*d*) 2 Meriv. 53, 54; 3 Price, 404.

(*c*) 2 Meriv. 45; S. C. 3 Price, 399.

tor, who is also a trustee, shifting a legacy from his hands as executor into his hands as trustee, does not thereby appropriate the legacy. And, according to the report of the case by Mr. Price, his lordship seems to have been of opinion that appropriation means payment. But with reference to this part of his lordship's judgment, it was observed by Alexander L. C. B., in the above mentioned case of *The Attorney General v. Wood*, (e) after remarking that the case of *Hill v. Atkinson* could not be justly considered as opposed to *The Attorney General v. Manners*: "If I were disposed to give the utmost effect to these words to the utmost extent that the counsel for the defendant could desire, I should not think myself at liberty to consider that which is but an *obiter dictum*, and not necessary to the decision of that case, an authority sufficient to overrule that which was actually done by this court, upon great consideration. But I do not think, even giving full effect to those words, that such a consequence should follow. All that the lord chancellor says is, that a transfer by an executor to himself as trustee is an appropriation of the legacy. It has been so held for a considerable length of time. For particular purposes, unquestionably it is an appropriation. If an executor transfer into his own name as trustee the amount of a particular legacy, and *acts upon that transfer, that is an appropriation as against many persons, and in particular as against himself. But the question here is, whether that act so done is to be considered as a delivery of the legacy as against the revenue, and this act of parliament; whether it is a retainer, or a satisfaction, or a discharge. Now the fact is, that it has not been delivered, it has not been retained, it has not been satisfied, and it has not been discharged, but the executor and the trustee is at this moment liable, in consequence of having this fund in his hands." His lordship further observed in the course of his judgment: "The case of *Hill v. Atkinson* is a case in which the executor or trustee, or whatever name you give him, was actually discharged, as much as if there had been persons in being entitled to give him a legacy receipt, if a receipt was necessary at that time. The money was paid into court, and distinguished from all the rest of the testator's effects, but above all, taken out of the hands of the executor, and paid into the name of the accountant general of the court, under the directions of the court, for the benefit of the legatees. That,

(e) 2 Y. & Jerv. 300.

therefore, was an actual payment by the executor, for the use of those persons, whoever they might be. Whether it was a vested interest, or a contingent interest, the executor was discharged, which in this case he undoubtedly is not."

In *Coombe v. Trist*, (*f*) a testator bequeathed a sum of money to Ann Venning for life, and after her decease to her children, as she should appoint, and in default of appointment, equally among all her children, who, if sons, should attain twenty-one, or, if daughters, should attain that age, or be married; and if she should have no such children, then according to her appointment, and, in default of appointment, over. Upon the death of the testator, a suit was instituted for the purpose of having this legacy secured. Under the decree made in that suit in the year 1798, the * executors paid the amount into court, and, prior to November, 1802, the whole of it was invested in stock in the name of the accountant general, and placed to the separate account of Ann Venning, who continued to receive the dividends during her life. And Lord Lyndhurst held that this was a sufficient payment of the legacy within the stat. 55 Geo. 3, c. 184; and, therefore, that upon Ann Venning's death in the year 1834, the parties interested in remainder, who were the children of Ann Venning, were entitled to receive their several shares of the fund, without producing receipts for the legacy duty. His lordship, in giving his judgment, observed, that, "according to the act of parliament, the duty is to attach on all legacies paid after a certain day; and the sole question is, whether the legacy was in this instance paid before or after the particular day. Now it is admitted that the executors here paid the entire fund into court before that day, under the authority of an order, and that the money was afterwards transferred into the name of the accountant general, and invested on the account, and for the benefit of the tenant for life; and, upon the authority of *Hill v. Atkinson*, I consider that proceeding to have been a payment to such parties, whoever they might be, as should become eventually entitled to the legacy." (*g*)

In *The Attorney General v. Hancock*, (*h*) one Samuel Malbon by his will devised all his real estates, except his mortgages in fee, unto William Vivian and James Morell, their heirs and as-

(*f*) 1 My. & Cr. 69.

acted upon by the court of exchequer in

(*g*) The principle of this case and that of *Hill v. Atkinson* was recognized and

Atty. Gen. *v. Loscombe*, 5 H. & N. 564.

(*h*) 2 M. & W. 563.

signs, to and upon the uses and trusts therein mentioned, viz, to the use of William Malbon and his assigns for life, with remainder in tail to his issue, with divers remainders over, and the said Samuel Malbon, the testator, by his will gave and devised all the residue of his personal estate (after payment of debts and legacies), as also *all such real estates as he was seised of as mortgagee in fee unto William Vivian and William Malbon, their heirs, executors, administrators, and assigns, upon trusts to convert the whole of the said residue into money, and to lay out and invest the same, as soon as conveniently might be, in the purchase of real estate, to be conveyed to the said William Vivian and James Morell (the trustees of his real estates), their heirs and assigns, to and upon the same uses and trusts as were thereinbefore declared of and concerning his real estates. And the testator thereby declared, that until such purchases were made, his said executors should place out or continue all the said residue at interest, in the names of his said executors, on mortgage of real estate; or, if the same should not offer, that the residue should be placed out at interest in the public funds, and the interest and dividends were directed to be paid to the persons to whom the rents and profits of the real estate, therewith to be purchased, would belong by virtue of his will. The testator appointed the said William Vivian and William Malbon his executors, and died in 1791, when they took upon themselves the execution of the will. The residue amounted to 14,000*l.*, and was invested in mortgage, in the names of the executors, before the year 1796, and before the act of 36 Geo. 3, c. 52; after which William Vivian died, and William Malbon, who enjoyed the interest during his life, became the surviving executor. William Malbon died without issue in 1825, and appointed William Hancock and George Reade his executors. The money was never applied in the purchase of real estate; and William Hancock and George Reade, the executors under the will of William Malbon, on the 26th of January, 1832, paid the residue of the personal estate of Samuel Malbon (the original testator) to James Morell, he being the person entitled to it under Samuel Malbon's will. And the court of exchequer held that this was a legacy given by the will of a person dying before the 5th of April, 1805, and paid, satisfied, or discharged, after the 31st day of August, 1815, within the meaning of the stat. 55 Geo. 3, * c. 184, and was liable to the payment of legacy duty under that act.

Another question, with respect to the amount of the duties payable, has arisen in the instance of legacies given to a husband and wife for life, in a case where the one is of kin to the testator, so as to be within the lower scale of duties, and the other a stranger in blood, so as to be within the highest. In the *Attorney General v. Bacchus*, (i) where a legacy of the residue of a testator's personal estate was bequeathed to B. his son-in-law, and P. the wife of B. (the testator's daughter), their executors, &c. for their absolute benefit, it was held that such legacy was not liable to the duty of 1*l*. per cent. on the whole, as a bequest to or for the benefit of P., a daughter of the testator, nor to 10*l*. per cent. on the whole, as being given to, or devolving on, or for the benefit of B., a stranger in blood to the deceased; but that it was liable to the payment of 1*l*. per cent. as to one moiety, and 10*l*. per cent. as to the other. And this decision was confirmed in the exchequer chamber. (j) Again, it was holden, in *The Attorney General v. Burnie*, (k), that a bequest of "the remainder of my property, of whatever it may consist, such money as arises from it to be invested in the public funds, the interest to be appropriated to the use of my son and his wife (a stranger in blood), for their lives, with remainder to my grandchildren, in equal proportions," was liable to legacy duty to be calculated at the rate of 1*l*. per cent. for the son's moiety, and 10*l*. per cent. for that of the wife; upon the principle that the son and his wife each took a life interest in one moiety of the income of the residue.

The law has been altered in this respect, as to legacies given by testators who shall have died on or after May 19, 1853, by the 11th section of the succession duty act. (l)

* It may be remarked, that the acts do not specify any time at which the executor or administrator must render his final or residuary account at the stamp office; for the obvious reason that the peculiar circumstances of the property of the deceased would, in many cases, preclude the possibility of complying with any such restriction. But the duty must be paid on the accruing profits and income of the effects of the deceased, from the time of his death to that of de-

(i) 9 Price, 30.

(k) 8 Y. & Jerv. 531.

(j) 11 Price, 547. See *Atcheson v. Atcheson*, 11 Beav. 485, 490.(l) See *ante*, 1592.

livering the account and offering to pay the duty at the stamp office. (*m*) In *The Attorney General v. Cavendish*, (*n*) Lord F. Cavendish died in October, 1803, and on the 20th of July, 1808, the defendant, as executor and residuary legatee, delivered in his residuary account of the testator's personal estate intended to be retained by him, and offered to pay the duty on the residuary estate, exclusive of the interest which had accrued since the testator's decease, 324*l.* less than it would have been had the duty been computed on the interest accrued. And it was decided that the duty was payable on the interest accrued from the death up to the time of the delivering of the account.

So in *Thomas v. Montgomery*, (*o*) it was holden that when a legacy is not paid at the time appointed by the testator, legacy duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest which is ultimately received by the legatee. (*p*)

But it was holden by the court of exchequer, in *The Attorney General v. Holbrook*, (*q*) that where by a will a specific debt is forgiven, which is known and ascertained at the time of the testator's death, legacy duty is not payable upon the interest accruing in respect of such debt, between the time of such death and the period when the executors close their accounts.

(*m*) 1 Rop. Leg. 787, 3d ed.

(*n*) Wightw. 82.

(*o*) 3 Russ. 582.

(*p*) See, also, accord. *Bate v. Payne*,

13 Q. B. 900, as to profits accruing on leaseholds.

(*q*) 3 Y. & Jerv. 114.

* CHAPTER THE SECOND.

UPON WHAT SUBJECTS THE DUTIES ARE PAYABLE.

It has appeared that legacies of every description, given by will or other testamentary instrument, of above the value of 20*l.* each, (*a*) payable out of personal estate, including donations *mortis causâ*, (*b*) and whether given by way of annuity or otherwise, (*c*) and also legacies given subject to contingencies, (*d*) are liable to the duties imposed by the statute 55 Geo. 3, c. 184.

As to leaseholds, the succession duty act (s. 19) provides that after May 19, 1853, they shall not be chargeable with legacy duty, but shall be included in the term "real property," and, as such, be liable to succession duty. (*e*)

There has already been occasion to consider generally what instruments are to be regarded as testamentary. (*f*) But it may be proper to inquire more particularly into the question with reference to the legacy duty.

In *The Attorney General v. Jones*, (*g*) a man conveyed by deed, for a nominal consideration, his leasehold and personal property to trustees, for the use of himself for life, and several persons therein named at his death, with a power reserved of revocation or alteration of the trusts. He never parted with the deed, or with any part of the property during his life; and he confirmed, in most respects, such disposition of it by will at his death. And it was holden by the court of exchequer (*Wood B. dissente*), that the two instruments * should be considered as to be taken and construed together as testamentary instruments, and that the property passing under them should pass as legacies, and be subject to duty.

(*a*) *Ante*, 1550.

(*b*) *Ante*, 1558, 1586.

(*c*) *Ante*, 1554, 1558, 1586.

(*d*) *Ante*, 1565.

(*e*) *Ante*, 1596.

(*f*) See *ante*, 103-107. See, also, *Gaskell v. Gaskell*, 2 Y. & Jerv. 502; and the remarks by Wood V. C. on that case, 4 Kay & J. 214, 215.

(*g*) 3 Price, 368.

But in *Thompson v. Browne*, (*h*) Sir C. Pepys M. R. held that an instrument, vesting property in trustees for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with a power of revocation, was not testamentary, and, consequently, not liable to the payment of legacy duty. And his honor observed, that "the decision in *The Attorney General v. Jones* seems to have proceeded upon the ground that, under the circumstances of that case, nothing passed from the maker of the instrument so as to entitle any other person to interfere with his property in his lifetime. If there be anything in that decision to support the notion that, where a person by deed settles property to his own use during his life, and after his decease for the benefit of other persons, a power of revocation reserved in such a deed alters the character of the instrument, and renders it testamentary, and consequently subject to legacy duty, I can only say, that if this were law, a great number of transactions of which the validity has never been doubted would be liable to be impeached." (*i*)

* But cases of this kind, which occur after May 19, 1853, will fall, it should seem, within the operation of the 8th section of the succession duty act. (*k*)

In *Woodbridge v. Spooner*, (*l*) where the deceased, in her life-

(*h*) 3 My. & K. 32.

(*i*) See, also, *Majoribanks v. Hovenden*, 1 Drury, 11, 27, 29, *coram* Sir E. Sugden C. of Ireland. In *Sheldon v. Sheldon*, 1 Roberts. 83, Dr. Lushington (sitting for H. Jenner Fust) said he had always understood that the case of *Atty. Gen. v. Jones* had been disapproved of; and that in his judgment it was an erroneous decision. And the same opinion was very decidedly expressed by Lord St. Leonards in *Brown v. Adv. Gen.* 1 Macq. H. of L. 79. In *Fletcher v. Fletcher*, 4 Hare, 79, in which case it was argued that a voluntary covenant by a testator, for payment by his executors of a sum of money to trustees in trust for his two natural sons, if they should survive him, was testamentary, and the cases collected, *ante*, 103, 104, were cited, Wigram V. C. said: "I certainly was not prepared to find that the cases had gone so far as they have upon the subject. Those cases, however, are very distinguishable from the one be-

fore me. This is not a case where there is a general power of revocation reserved — a general power to dispose by will, notwithstanding the execution of the instrument. In the cases referred to there has been a general reservation — or something like a reservation — of the party's right to deal with the property notwithstanding the instrument; and the courts have held that in such cases, the instrument being one which was not to have effect until the death of the party, or rather, I would say, to use the language of Sir John Nicholl, in one of the cases, in which, until the death of the party, the instrument itself was not consummated — until then no conclusive effect could be given to it. If that does not occur, the instrument is not to be considered as testamentary. In this case the party clearly was bound; and there is, therefore, no ground for the argument that the interest is testamentary."

(*k*) *Ante*, 1590.

(*l*) 1 Chitt. R. 661; S. C. 3 B. & Ald. 233.

time, gave to the plaintiff a promissory note to pay him or order "on demand the sum of 100*l.* for value received and his kindness to me," with a verbal engagement on the part of the plaintiff, that the note should not be demanded until after her death, it was holden by the court of king's bench, that parol evidence could not be received to show that it was not given for a valuable consideration; and that such a note did not operate by way of testamentary disposition; nor was it void on the ground that it was a fraud on the legacy duty, that duty never having attached upon it, and there being nothing to show that the amount passed by way of a *donatio mortis causâ*. (*m*)

With respect to the suggestion of fraud on the legacy duty, it should be observed, that a man may well make a settlement or create a trust *inter vivos* for the purpose of avoiding *legacy duty. It is often done, and may reasonably and properly be done. (*n*) But to cases of this kind, also, which occur after the succession duty act has come into operation, the 8th section of that statute appears to have been intended to apply. (*o*)

The duties imposed by the legacy acts are payable, not only upon a legacy payable out of the personal estate, strictly considered, of the testator, but out of any personal estate which the testator had the power of disposing of, as he or she might think proper. Thus, In re Cholmondeley, (*p*) by the marriage settlement of Mrs. Cholmondeley, 20,000*l.* was vested in trustees, upon trust to pay the dividends to Sir Philip Francis for life, and after his death to Mr. Cholmondeley for his life, with remainder to Mrs. Cholmondeley for her life, and with a power of appointment amongst her children, in case there should be any; and, in default of issue, to such

(*m*) But in a case which occurred after the wills act, where, among the testator's papers, two letters were found, sealed and directed, "For Sarah Gough, my late servant," each containing a promissory note signed by him, and one of the letters stated that the deceased inclosed 200*l.* as a mark of respect, and the other that the inclosed was for her long and faithful services, it was held that the notes were, in effect, invalid testamentary instruments and void. *Gough v. Findon*, 7 Ex. 48.

(*n*) *Farquharson v. Cave*, 2 Coll. 366,

per Knight Bruce V. C. So it was said by Lord Lyndhurst C. B. that every subject has a right so to shape the disposition of his property as to avoid the legacy duty, if possible; and that there is no fraud in so doing. 2 Cr., M. & R. 221, In re Evans. See, also, the observations of Wood V. C. in *Vandenberg v. Palmer*, 4 Kay & J. 215.

(*o*) See *ante*, 1590.

(*p*) 1 Cr. & M. 149; S. C. 3 Tyrwh. 10.

persons as she shall by will appoint, in case she died in her husband's lifetime, or by deed or will, in case she should survive her husband; and in default of appointment amongst her next of kin; Mrs. Cholmondeley died in her husband's lifetime, having, by her will, appointed this sum of 20,000*l.* to certain persons mentioned in her will. And the court of exchequer held that legacy duty was payable on the 20,000*l.* The barons were of opinion that, taking all the acts together, applicable to the same subject, and passed *in pari materia*, and the legislature in the 36 Geo. 3, (*q*) and the 45 Geo. 3, (*r*) having described and defined what they meant by a legacy, it was *impossible to come to a conclusion that they meant to use that term in a more limited sense in the statute of 55 Geo. 3.

In *Platt v. Routh*, (*s*) John Ramsden, by his will dated the 10th of March, 1825, after giving various legacies, and directing his real estates to be sold and converted into personalty, gave the general residue of his personal estate to his daughter Judith Ann Platt, and three other persons, his executrix and executors, upon trust to permit his said daughter to receive the interest and dividends thereof during her life, and after her death (subject to certain payment then to be made) upon trust for such person or persons, *other than and except Joseph Woodhead and his relations, Moses Hoper and his relations, and the relations of the late husband of his said daughter and every of them*, in such parts, shares, and proportions, and in such manner and form as the said Judith A. Platt, whether sole or covert, should by will appoint, and in default of appointment, in trust for the next of kin of Dyson Ramsden; and the testator declared, that in case his said daughter should intermarry with the said Joseph Woodhead or any of his relations, or should reside with or receive visits from him or them, then the bequest in her favor should utterly cease. The testator died in May, 1825, and his will was duly proved by his executrix and executors. After his death, the said Judith A. Platt married George E. Platt, and the interest and dividends of the testator's residuary estate (which was very considerable), were regularly paid to her until her death, on the 7th of September, 1837. In April, 1837, she made a will, and thereby, in exercise of the

(*q*) See *ante*, 1557, 1558.

(*s*) 6 M. & W. 756.

(*r*) See *ante*, 1583. See, also, stat. 8
& 9 Vict. c. 76, s. 4, *ante*, 1586.

power under her father's will, she gave 10,000*l.* consols to the descendants of the before named Dyson Ramsden, and all the rest of her late father's property to various persons, strangers in blood both to her father and herself. By order of the master of the rolls, a case was stated for the opinion of the barons of the *exchequer, as well as to the liability of Judith A. Platt's will to the probate duty, (*t*) as also to the legacy duty payable in respect to the bequests contained in the two wills. Their lordships thought that the question, so far as regarded the legacy duty, depended entirely upon the construction to be put upon the 18th section of the 36 Geo. 3, c. 52, (*u*) which regulates the duty in cases where legacies are given subject to power of appointment; and they were of opinion that the power under consideration must be treated as a general and absolute power within the meaning of that section. The barons were also of opinion that according to the true construction of the 7th section of the same statute, (*v*) the property subject to the power was personal estate, which Judith A. Platt had power to dispose of as she should think fit. Their lordships accordingly certified to the master of the rolls their opinion that, on the death of Judith Ann Platt, a duty of one per cent. became payable in respect of the bequest in the will of John Ramsden of the residue of his estate and effects to the said Judith Ann Platt, after allowing any duty already paid in respect thereof. And also their further opinion, that legacy duty was payable in respect of the bequest contained in the will of the said Judith Ann Platt, at same rate at which it would have been payable if they had been mere legacies given by her, payable out of her own personal estate. This opinion of the barons was afterwards affirmed by the decree of Lord Langdale; (*x*) and finally by the decision of the house of lords. (*y*)

In *The Attorney General v. Brackenbury*, (*z*) it was held that where the residuary legatees were the persons who would have been entitled in default of appointment, if the donee of the power had exercised it by charging in the first instance his residuary estate with his debts and legacies, it *is not competent for the residuary legatees to disclaim the fund under the appointment

(*t*) See *ante*, 625, 626.

(*u*) *Ante*, 1566.

(*v*) *Ante*, 1557. See, also, stat. 8 & 9 Vict. c. 76, s. 4, *ante*, 1586.

(*x*) 3 Beav. 257.

(*y*) 10 Cl. & Fin. 257.

(*z*) 1 H. & C. 782.

and elect to take under the gift to them in the original instrument, so as to be chargeable only with a lower rate of duty.

In *The Attorney General v. Pickard*, (a) a testator devised real estates to William Trenchard for life, with remainder to his first and other sons in tail, with remainder to Thomas Pickard for life, remainder to his first and other sons in tail, remainder to George Pickard for life, with remainders over, and gave a power to the several persons who, by virtue of the limitations in the will, should be in actual possession of the estates by deed or will, to appoint to any woman or women they should marry, by way of jointure, rent-charges not exceeding 750*l.* per annum for life, to be issuing out of and chargeable upon the devised estates, clear of all taxes and deductions whatsoever. William Trenchard died without issue, and Thomas Pickard entered into possession of the estates, and, by his will, charged them with 750*l.* per annum by way of jointure to his wife, under the power, and died without issue male; whereupon George Pickard entered into possession. And the barons of the exchequer held that George Pickard was chargeable (under 45 Geo. 3, c. 28, s. 5, *ante*, 1584) with legacy duty after the rate of 10*l.* per cent. on the value of the rentcharge of 750*l.* per annum; their lordships being of opinion that the annuity in question, being a legacy, was charged upon the real estates by the will which created the power to charge, in like manner as if the person, to whom it was given by the execution of the power, had been mentioned by name as the object of the testator's bounty in the will which gave the power. And this decision was afterwards affirmed in the exchequer chamber. (b)

This case was followed by that of *The Attorney General v. Henniker*, (c) in which it was held by the same court to * make no difference that by the husband's appointment of the annuity by way of jointure it was given to the wife on condition that she should relinquish her right to dower. (d)

In giving the judgment of the court of exchequer chamber in

(a) 3 M. & W. 552.

(b) 6 M. & W. 438.

(c) 7 Ex. 331.

(d) See, also, accord. *Sweeting v. Sweeting*, 1 Drew. 331. The barons doubted whether, if this condition has been annexed by the original testator himself, the

duty would have been payable on the whole annuity, or on the amount of it after deducting the value of the dower. But in *Sweeting v. Sweeting*, Kindersley V. C. was of opinion there is no ground for any such doubt.

the case of *The Attorney General v. Pickard*, Lord Denman intimated his opinion, that charges of this nature would be exempt, if originally made by deed, under the proviso contained in stat. 45 Geo. 3, c. 28, s. 4. *(e)* And this opinion was subsequently acted upon by the court of exchequer in *The Attorney General v. Lord Hertford*. *(f)* There A., by deed, dated in 1802, conveyed certain lands to trustees, to the use of himself for life, remainder to B., his son, for life, with remainders over. The deed contained a proviso that it should be lawful for B., by his last will, to limit and appoint to the use of himself, or any other person or persons, any annual sum or sums of money, not exceeding the yearly sum of 700*l.*, to be charged upon and payable out of the lands included in the deed, to commence from the death of B., and to be either perpetual or in fee, or payable for such times and in such manner in all respects as B. should think fit. B., by his will, by virtue of this power, appointed an annuity of 700*l.* a year to C. for her life, charged upon and payable out of the said land. And it was held by the court of exchequer, that legacy duty was not payable in respect of such annuity.

This decision occasioned the passing of the stat. 8 & 9 Vict. c. 76, *(g)* which contains a wider definition of a legacy, and a narrower proviso, than that contained in the statute of 45 Geo. 3. And legacy duty has since become * chargeable on every disposition by will, under a power, of money which is payable out of real estate, or a charge thereon, whether the power was created by deed or will. And it has also been held that the statute is retrospective, so that the duty is chargeable on money paid after the act came into operation, notwithstanding the testator died before. *(h)*

It will be seen that in the act of Victoria the proviso at the end of the clause confines the exemption from duty to money which, by marriage settlement, is subjected to any limited power of appointment to or for the benefit of persons specially named or described therein as the objects of the power, or of their issue. And even this exemption has been practically repealed by the succession duty act. *(i)*

(e) See *ante*, 1583.

(f) 14 M. & W. 284.

(g) *Ante*, 1586. See Trevor on Taxes of Succession, 104, 105.

(h) Atty. Gen. v. Lord Hertford, 3 Ex. 670.

(i) See Trevor on Taxes of Succession, 187.

It has appeared, (*k*) that legacies of every description of the value of 20*l.* or upwards, given out of or charged upon real or heritable estate, (*l*) or out of any moneys to arise by sale, mortgage, or other disposition of real or heritable estate, or any part thereof, and also the clear residue, when * given to one person, and every share of the clear residue (when given to two or more persons), of the moneys to arise from the sale, mortgage, or other disposition of any real or heritable estate *directed to be sold*, mortgaged, or otherwise disposed of, by any will or testamentary instrument, where such residue or share shall amount to 20*l.* or upwards, are subjected to the stamp duties. (*m*) With respect to the construction of this part of the statute of the 55 Geo. 3, c. 184, the court of exchequer, In re Evans, (*n*) decided that where there is a bequest of real property to trustees and a discretion given to them to sell or not to sell, as they shall think best for the *cestuis que trust*, the duty does not attach, notwithstanding the trustees shall have exercised their discretion by an actual sale; for that a sale made under a *discretion* given to trustees to sell and distribute the proceeds, but without any positive direction imposing on them the obligation of selling, is not to be considered a sale *directed* by the testator, within the meaning of the statute. This case has been regarded by the court of exchequer as overruled by the cases of The Attorney General v. Mangles, (*o*) and the Attorney General v. Simcox, (*p*) and it was considered to be fully established that *if an*

Duties on legacies, &c. out of, or charged on, real estate:

land directed to be sold:

(*k*) *Ante*, 1550, 1551.

(*l*) No legacy duty is payable on the value of personal estate given up by one legatee to another under the doctrine of election (*ante*, 1440 *et seq.*). But when the testator devises his own real estate to A., and bequeaths A.'s personal estate to B., the legacy duty is payable on the value of the personal estate so charged on the testator's real estate. *Laurie v. Clutton*, 15 Beav. 131. Where, however, a testator died in 1811, having devised lands to his nieces as tenants in common in fee, with a proviso that if his nephew should transfer 10,000*l.* consols into the names of trustees for the benefit of the nieces, the lands should inure to the use of the nephew, and the nephew in the

course of the following year having exercised his option, and transferred the consols, it was held, in the Attorney General v. Wyndham, 1 H. & C. 571, that the defendant, the executor of the last surviving trustee, was liable to pay duty on the 10,000*l.* consols at the rate of two and a half per cent.; for that the money arose by a "disposition" of the testator's real estate, within the meaning of the stat. 48 Geo. 3, c. 149, s. 2. See *ante*, 1585.

(*m*) See, also, stat. 45 Geo. 3, c. 28, *ante*, 1583, and stat. 8 & 9 Vict. c. 76, s. 4, *ante*, 1586.

(*n*) 2 Cr., M. & R. 206.

(*o*) 5 M. & W. 120.

(*p*) 1 Ex. 749.

actual sale takes place, the proceeds are liable to duty, whether the sale is made by the trustees under an absolute direction given to the trustees to sell at all events, or under a direction given to them to sell in case they shall deem it expedient to do so. (q) However, a contrary doctrine seems to have been maintained in the case of *The Advocate General v. Smith*, (r) in the house of lords, where Lord St. Leonards said he thought the case of *In re Evans* had been rightly decided, and he denied that it had ever been overruled. It has also been held that if a real estate is sold under the general power * of the court of chancery to direct a sale for satisfying charges, no legacy duty is payable, although the will contains a discretionary power to trustees to sell. (s)

Again, where the trustees have a discretion to sell or not to sell, *and they think fit not to sell*, the legacy duty does not attach. (t) And consequently, in every will of this kind, where *no actual sale* takes place, a question of construction arises, viz, whether, taking the will altogether, there is a *direction* to the trustees to convert the estate into money; or whether it is really left in their *discretion* not to convert it into money, but to leave it as land. The words of discretion may be so controlled as to show that they are only in semblance words of discretion, and in reality words of direction; (u) and if they are of the latter description, the legacy duty will attach under the act, notwithstanding the *cestui que trust* in fact takes the property in *statu quo*, and the trustees do not convert it into money by sale, according to the directions of the will, there being no claim to render such sale necessary. (x)

If a testator devises real estate to trustees with directions to sell it, and invest the money arising from such sale in the purchase of other real estate, no duty is payable, though the estate be sold, and the proceeds paid to the person entitled to the estate to be bought. (y)

It was held by Lord Cottenham in *The Attorney General v.*

(q) See 1 Ex. 765, 766, 768; Atty. Gen. v. Metcalfe, 6 Ex. 43, by Parke B.

(r) 1 Macq. H. of L. 760.

(s) *Hobson v. Neale*, 8 Ex. 368; 17 Beav. 178. *Secus*, where the sale is ordered by the court, in consequence of the directions in testator's will. *Harding v. Harding*, 2 Giff. 597.

(t) 5 M. & W. 120.

(u) *Advocate General v. Ramsay's Trustees*, 2 Cr., M. & R. 224, note (a).

(x) *Atty. Gen. v. Holford*, 1 Price, 426; *Williamson v. Advocate General*, 10 Cl. & Fin. 1, accord.

(y) *Miles v. Jennings*, 8 Ex. 830; *Heal v. Knight*, 8 Ex. 839, note (a).

Jones, (z) that the profits arising from the tolls of a lighthouse are real estate, and not subject to legacy duty. Tolls.

These and similar questions have obviously lost their *importance since the succession duty act has taxed all real estate equally with personalty.

In *The Attorney General v. Jackson*, (a) the testator, Samuel Jackson, gave a life estate in his freehold property to Charlotte Troughton, and after her death, and in the event of her husband, Joseph Troughton, surviving her, he gave him "one annuity or yearly rentcharge" of 500*l.* Duty on a bequest of rent-charge, annuity, &c. &c. a year, payable quarterly, out of his real estate, with a landlord's power of distress and entry, and subject to that annuity, he gave his real estate in moieties to Randle Jackson and William Jackson, Randle Jackson having an estate in fee, and William Jackson an estate for life. The question was, whether the annuity of 500*l.* a year, thus given to Joseph Troughton, was to be considered a legacy within the meaning of the acts of parliament imposing duties on legacies. It was contended, on behalf of the defendants, that the subject-matter was in fact real property; that it was a rentcharge, *i. e.* a freehold interest in the party in whose favor it was granted; that it was as much so, as far as related to the 500*l.* per annum, as the estate out of which it issued; and that it was not the intention of the legislature, in imposing the legacy duties, to impose any duty whatever upon real property. But the court of exchequer held that the annuity in question fell precisely within the terms made use of by the legislature in the stat. 55 Geo. 3, c. 184, with respect to gift by way of annuity, viz, "all gifts of annuities, or by way of annuity, or of any partial interest or benefit, out of any such estate or effects as aforesaid," (b) and was therefore liable to the duty. (c)

But in *Shirley v. Lord Ferrers*, (d) a testator devised certain estates to the use of trustees for the term of five hundred years, and *subject thereto, to the use of other trustees, to preserve contingent remainders, with remainder to the first and other sons of

(z) 1 Mac. & G. 574.

(a) 2 Cr. & Jerv. 101.

(b) *Ante*, 1554.

(c) See, also, *Stow v. Davenport*, 5 B.

& Ad. 359; 2 Nev. & M. 805, in which case the court of K. B. recognized and acted on this decision.

(d) 1 Phill. C. C. 167.

C. S. (then an infant), with divers remainders over, and he directed that the trustees of the term should, after paying certain annuities, apply so much of the rents and profits of the estate as they should think fit (not exceeding in any one year a certain amount), in aid of another fund, to the maintenance and education of C. S., until she should attain twenty-one or marry, and that they should accumulate the surplus rents and profits for the benefit of C. S. when she should attain twenty-one or marry, and if she died under twenty-one and unmarried, then for the benefit of the parties entitled under the subsequent limitations of the estates, and that upon her attaining twenty-one or marrying, they should, during her lifetime, pay the surplus rents, after paying the annuities, to her for her separate use. It was contended, on behalf of the crown, that the trust for maintenance amounted to "a gift by way of annuity," or "to a partial interest or benefit." But it was held by Lord Lyndhurst that the sums annually applied out of the rents and profits, under the trusts of the term, to the maintenance and education of C. S. until her marriage, were not liable to legacy duty. And his lordship expressed his opinion, that nothing but what is a charge upon the estate of another person is within the act. (*e*)

Legacies of personal estate to be laid out in land were within the scope of the acts, prior to the statute 36 Geo. 3, c. 51, imposing a stamp duty on receipts. (*f*) And there is no reason for excepting this class of legacies from the operation of the retrospective schedules. (*g*)

It was holden in the case of *Izon v. Butler*, (*h*) that a bequest * by the obligee of a bond to the obligor in these terms, "I remit and forgive to Thomas Whithurst the sum of 500*l.* which he stands indebted to me on his bond, and I direct the said bond to be delivered up to him and cancelled," was merely a personal legacy, and subject to the incidents affecting legacies. And accordingly, in *The Attorney General v. Holbrook*, (*i*) the obligee of a bond, after the death of one James

Duty on a legacy consisting of forgiveness of a debt.
(*e*) See *Swabey v. Swabey*, 15 Sim. 502 (*ante*, 615), as to money belonging to the testator, and charged on his own real estate, continuing a charge so as to be subject to legacy duty.

(*g*) *Atty. Gen. v. Hancock*, 2 M. & W. 563, *ante*, 1620.

(*h*) 2 Price, 34.

(*i*) 3 Y. & Jerv. 114; S. C. 12 Price, 407.

(*f*) See *ante*, 1555.

Willis, the principal therein, but during the life of the surety, who was the testator's brother, made his will, containing the following directions relative to the bond: "I hereby forgive the bond debt, both principal and interest, due to me and entered into by James Willis and my brother James Holbrook with and for him, for the said James Willis's paying me the principal sum of 4,000*l.* and interest, &c. &c. and do order the said bond, at my decease, to be delivered up and cancelled." The interest upon the bond was paid up to the death of the testator, whom his brother, James Holbrook, survived. And it was holden that this was a legacy, whereon legacy duty was payable by James Holbrook.

In *Foster v. Ley*, (*k*) where a testatrix bequeathed property in trust to pay off the debts of her first husband that could be legally and satisfactorily proved against him, as it was her will and desire that the same should be discharged, the court of common pleas held that the creditors ought to pay the legacy duty on their several debts. But in *Williamson v. Naylor*, (*l*) where a testator by his will declared that one fifth of the residue of his personal estate should be divided amongst certain of his creditors, named in a schedule to his will, and the schedule contained both the names of the creditors, and the debts due to them respectively, the remedy for the recovery of which was barred by the statute of limitations; it was held by Lord Lyndhurst C. B., and * afterwards by Alderson B., that the parties so named in the schedule were not to be considered as legatees but as creditors; for that the bequest was not a legacy subject to the payment of legacy duty, but a trust created by the testator in satisfaction or reduction of debts, the remedy for the recovery of which was barred by the statute. (*m*) Nevertheless, in *Turner v. Martin*, (*n*) where a testator who was a certificated bankrupt, directed his executors to pay in full all his creditors who had proved, it was held by Lord Cranworth C. that the legacy duty was payable on the amount which the testator had directed to be paid to the official assignee for that purpose; for that the testator must be regarded as having conferred a mere bounty on the creditors.

(*k*) 2 Bing. N. C. 269. See O'Connor v. Haslam, 5 H. L. Cas. 170, 174; S. C. cited *nomine* Richards v. Foster. (*m*) See, also, Phillips v. Phillips, 3 Hare, 290.

(*n*) 7 De G., M. & G. 429. See, also, In re Sowerby's Trust, 2 Kay & J. 630.

In a case before Shadwell V. C. In re Franklin's Charity, (*o*)
 Duty on a legacy given to a charity. Joseph Franklin bequeathed to the poor of the parish of Haddenham 50*l.* per annum forever, to be laid out in bread at Christmas, and distributed by the minister and churchwardens to the most needy objects in the parish. And the testator charged all his leasehold and personal property with this, amongst other legacies. And his honor held that this was a legacy on which duty ought to be paid; on the ground that, although it was not expressed to be given to any individual, yet, in effect, it was given in such a manner as that the executor held it in trust for certain purposes. And his honor, in giving his judgment, observed, that where legacies have been given to treasurers of hospitals, and other charitable institutions, it has been considered as a matter of course to pay the duty.

But In re Wilkinson (*p*) the barons of the exchequer held that executors cannot be called upon to pay legacy duty upon the whole of a residue bequeathed to them in trust * to divide the interest "among poor pious persons, male or female, old or infirm, in ten or fifteen pounds, as they see fit, not omitting large and sick families, if of good character." (*q*) This judgment, which was afterwards affirmed in the exchequer chamber, (*r*) has been regarded, in effect, as having overruled the above decision of the vice chancellor. And it has been observed, that the 11th section of the statute 36 Geo. 3, c. 52, (*s*) on which much stress was laid by the barons, and the judges in error, does not appear to have been brought under his honor's notice, in the argument of the case before him.

However, in The Attorney General v. Fitzgerald, (*t*) where the testator gave his residuary estate (which amounted to 13,000*l.*) to his executors to be by them appropriated to the education of the children of the poor in Ireland, principally those in or about Lim-

(*o*) 3 Y. & Jerv. 544; S. C. 3 Sim. 147.

(*p*) 1 Cr., M. & R. 142; S. C. 4 Tyrwh. 514.

(*q*) If any of the objects of the above bounty should have received to the amount of 20*l.* or upwards, by having been selected to receive such bounty on more than one occasion, legacy duty would attach on such amount, and the duty would be calculated

according to the nearness of blood of such individual, and in that case the executors would be accountable for, and bound to retain the duty chargeable on such amount.

1 Cr., M. & R. 142.

(*r*) Atty. Gen. v. Nash, 1 M. & W. 237.

(*s*) See *ante*, 1560, 1561.

(*t*) 13 Sim. 83.

erick; the same learned judge held that legacy duty was payable on the residue. And his honor said that there was a material distinction between the case *In re Franklin's Charity* and the case *In re Wilkinson*. That in the former there was a gift of a perpetual annuity of 50*l.* to be disposed of in charity; in the latter, the judges seem to have considered that there was a gift of a sum in gross, which was at once to be disposed of by the executors, apparently, as if it was not a charity. But that this of itself furnished a material difference between the two cases; because, if the bequest was to be considered as a charitable bequest in its origin, then the court of chancery must, of necessity, have a dominion over the subject of the bequest, and would, from time to time, determine in what * manner the property should be enjoyed; and long before any person participated, the legacy must be paid. And his honor added, that he much doubted whether either portion of the 11th section of 36 Geo. 3, c. 52, applies to a case where the whole subject of the bequest must be taken *in solido*, at once, for the purpose of being applied in perpetuity, in some manner that may be such that no one individual will ever participate in the subject itself, but will have a benefit which results from the application of a large sum of money in some given manner, not consisting in the payment of money. The learned judge proceeded to express his opinion, that the legacy in question was liable to duty in the same manner as if it had been given to the trustees for an existing school for the purposes specified. This view of the subject was recognized and acted upon by Parke B. in a similar case, on a subsequent occasion, *In re Griffiths*, (*u*) and the learned baron expressed his concurrence in this opinion of V. C. Shadwell. And in two subsequent cases, (*x*) Romilly M. R. declined to follow the case, *In re Wilkinson*, and said he believed that decision had been afterwards disapproved of by the court which decided it. Again, in a late case, (*y*) the court of exchequer held that a bequest of money for the purpose of building a church and parsonage house, and of endowing and repairing the church, was subject to a legacy duty of 10*l.* per cent. (*z*)

In cases within the operation of the succession duty act, all ques-

(*u*) 14 M. & W. 510.

(*x*) *In re Pearce*, 24 Beav. 491; *Harris v. Earl Howe*, 29 Beav. 261.

(*y*) *In re Parker*, 4 H. & N. 666.

(*z*) The barons were of opinion that at all events the duty was payable under the 16th section of the succession duty act.

tions of this kind will be disposed of by the 16th section of that statute. (a)

The statute 39 Geo. 3, c. 73, after reciting that "it is expedient that certain specific legacies given to bodies corporate, * or other public bodies and societies, should be exempted from the duties imposed on legacies," proceeds to enact, "that no legacy, consisting of books, prints, pictures, statues, gems, coins, medals, specimens of natural history, or other specific articles, which shall be given or bequeathed to or in trust for any body corporate, whether aggregate or sole, or to the society of Serjeants' Inn, or any of the inns of court or chancery, or any endowed school, in order to be kept and preserved by such body corporate, society, or school, and not for the purposes of sale, shall be liable to any duty imposed on legacies by any law now in force."

It has been long established that property in this country, belonging to a foreigner who dies domiciled abroad, and appoints an English executor, and bequeaths to English legatees, is not liable to legacy duty. (b)

If the testator was a British subject domiciled in Great Britain, all his personal property, in whatever part of the world it may be situate, is considered as English personal estate, and is liable to the duties imposed by the statutes on legacies and successions. For the rule is, that personal property follows the person, and is not in any way to be regulated by the *situs*. (c) Thus, In re Ewin, (d) it was held by the court of exchequer, that American, Austrian, French, and Russian stock, the property of a testator domiciled in England, was liable to legacy duty.

But it is clear that the legacy acts are co-extensive with the limits of this kingdom, and this kingdom only, and do not extend to the territorial possessions of the crown in the colonies. (e) Hence, where persons die domiciled in India, whose estates, though the estates of British subjects, are distributed in India, they are

(a) *Ante*, 1594.

(b) In re Bruce, 2 Cr. & Jerv. 436; S. C. 91.
2 Tyrwh. 475.

(c) See *ante*, 1515 *et seq.*

(d) 1 Cr. & Jerv. 151; S. C. 1 Tyrwh.

(e) 1 Cr. & Jerv. 153; 1 Tyrwh. 103,
by Alexander L. C. B.; 1 Cr. & Jerv. 158;
1 Tyrwh. 107, by Bayley B.

not chargeable with any legacy duty. (*f*) Hence, also, if a testator die domiciled in India * and his personal estate be wholly in India, and his executor be resident there, and the executor remit to a legatee in England, or to some other person in England, for the specific use of the legatee, the amount of his legacy, it has uniformly been held that no legacy duty is payable on such remittance, inasmuch as the whole estate is administered in India, and the remittance is in respect of a demand which is considered as established there. (*g*) Accordingly, in *Hay v. Fairlie*, (*h*) a testator, resident in India, bequeathed to an infant a sum of money to be invested in the company's securities, of which the interest was to be applied to her maintenance, and the principal to be settled upon herself for life, with remainder to her children. He was lost on his voyage to England, leaving all his property in India. His executors, resident in that country, proved his will at Calcutta, invested the legacy in the company's securities, and for several years remitted the interest to their correspondents in London, for the benefit of the legatee, who had come to England. A part of that interest was brought into court, in a suit established by her for the appointment of a guardian and for the allowance of maintenance, and an order was made for the payment to her guardian, out of the fund so created, of 200*l.* a year, as maintenance. And Lord Gifford M. R. held that there was a specific appropriation in India of the legacy, and that the payment of 200*l.* a year was not liable to the legacy duty. So in *Logan v. Fairlie*, (*i*) a testator resident in India, and having all his property there, bequeathed his residuary personal estate to his brother J. H. and his sister H. L. in equal shares; but in case his sister should die before him, then to her children. The executor, who was also resident in India, having proved the will there, remitted the residue to his agent in England, with a letter, in which he desired the agent to appropriate the fund according to the * annexed extract of the will, by which it would be perceived that half went to J. H. and half to H. L. or her children. H. L. had died in the lifetime of the testator, leaving nine infant children. A suit was instituted in England by the children against the agent, and also against the

(*f*) By Alexander, L. C. B.; 1 Cr. & Jerv. 153; 1 Tyrwh. 103.

(*g*) By Sir J. Leach V. C. in *Logan v. Fairlie*, 2 Sim. & Stu. 291.

(*h*) 1 Russ. 117.

(*i*) 1 My. & Cr. 59.

executor and J. H. who were both out of the jurisdiction, for the purpose of having a moiety of the fund secured. And it was held, by the lords commissioners Pepys and Bosanquet, that no legacy duty was payable upon such moiety, inasmuch as it had been appropriated in India.

The rule was once supposed to be different, where, although the testator was domiciled abroad, the assets came to be administered in England. Thus, in *The Attorney General v. Cockerell*, (*j*) the barons of the exchequer held that legacies bequeathed by a British subject resident in the East Indies, out of his personal estate, to persons living in England, are liable to the duty, if the executor proves the will in England, and pays the legacies here, notwithstanding the testator realized and possessed his property in India, resided there, made his will there, and died there; and although the executors were in India at the time of their appointment, and the will was originally proved there. So in *The Attorney General v. Beatson*, (*k*) it was holden by the court of exchequer that the legacy duty is payable on bequests of personal property in India, by a will there, and administration granted under it there, if it be remitted to England, and applied by another administrator in Scotland, under administration granted in England. Again, in *Logan v. Fairlie*, (*l*) Sir John Leach V. C. expressed his opinion, that if a part of the assets of a testator, who at his death was resident in India, and had all his property there, is found in England, in the hands of the agent of his executor, without any specific appropriation, and a legatee in England institute a suit here for the payment of his legacy, out of such unappropriated *assets, then such assets are to be considered as administered in England, and the legacy duty is payable in respect of them.

But modern decisions appear to have overruled this distinction. And it must be regarded as now fully established, that the personal assets, situate in India, of a testator who resides, and makes his will, and dies in India, are not subject to legacy duty, although such assets are afterwards remitted to this country, by an executor who has proved the will in India, to executors who have proved the will in England, and are administered under a decree of the court of chancery here. Thus, in *Jackson v. Forbes*, (*m*) a testa-

(*j*) 1 Price, 165.

(*l*) 2 Sim. & Stu. 284.

(*k*) 7 Price, 560.

(*m*) 2 Cr. & Jerv. 382.

tor born in Scotland, who resided and died in India, having real and personal property there situate, but no assets in England, by his will and testamentary papers, left the whole of his property in equal divisions to his four natural children, or the survivors of them, and their heirs, subject to legacies and annuities. His executors obtained an Indian probate, and paid the debts and bequests, and converted the principal part of the estate into money which they sent to their bankers in England, and invested it in the funds in their own names. Proceedings were commenced in England against the executors, to determine the claims under the will; whereupon the stock was transferred into the name of the accountant general of the court of chancery, and the court made a decree, ascertaining the shares of the several claimants. And the barons of the exchequer held that the legacy duty was not payable on legacies or shares of the residue bequeathed. And this decision was affirmed in the house of lords. (n) Again, in *Arnold v. Arnold*, (o) a man possessed of personal estates, situate partly in England, but principally in the East Indies, where he was employed in the service of the East India Company, made his will in the * East Indies, and died there. After specifically bequeathing his property in England to his wife, his will gave considerable pecuniary legacies to his infant children, and to various other persons, some of whom were native inhabitants of India. One of the executors lived in Calcutta, and proved the will there, and having collected the Indian assets, and thereout paid the testator's Indian debts and funeral expenses, he remitted the surplus to England to the other executors, by whom probate of the will, in respect of the property in England, had been already obtained in this country. In a suit instituted in this court by the testator's children against the executors, for the administration of the estate, the fund so remitted was transferred into court, and having proved insufficient to pay the pecuniary legacies in full, it was ultimately ordered to be apportioned among the different legatees, in proportion to their respective legacies. And Lord Cottenham held that the legacy duty was not payable in respect of any of the sums so appropriated to the respective legatees. His lordship considered the decision by the house of lords in *The Attorney*

(n) *Atty. Gen. v. Jackson*, 8 Bligh, 15; (o) 2 My. & Cr. 256.
S. C. *nomine Atty. Gen. v. Forbes*, 2 Cl. &
Fin. 48.

General *v.* Jackson as precisely in point, and conclusive of the case before him. But the learned judge also stated, that independently of that authority, he should, upon the construction of the act (36 Geo. 3, c. 52, s. 2), (*p*) have been of opinion that the legacies in question were not legacies given by the will of a person intended by the act; for when the act speaks of "any will of any person" and of the legacies being payable out of the personal estate, it must be considered as speaking of persons and wills, and personal estates in this country; that being the limit of the sphere of the enactment. (*q*)

*It may be observed that there were still several questions connected with these authorities, which must not be regarded as not precisely settled by them. Thus, it was undecided, whether property situate abroad, or in this country, belonging to an alien who is domiciled here, is liable to the duty; or whether property, situate in this country, belonging to a British subject who dies domiciled in the British colonies, or domiciled in a foreign country, (*r*) is so liable. In a former edition of this work, the writer ventured to suggest that the principle ought to be applied to these cases (as it appears to have been in the decision of the case *In re Ewin*), (*s*) that personal property follows the person and is to be considered as situate wherever the domicil of the proprietor is; (*t*) and consequently, that if the deceased, whether a British subject or a foreigner, died domiciled in England, all his personal estate, wherever situate, is to be regarded as English estate, and therefore liable. But if he died domiciled out of England, then the whole of his personal property, wherever it happened to be at the time of his death, is to be regarded as situate in the country of domicil, and therefore exempt. This suggestion has been fully justified by the subsequent decision of the house of lords in the

(*p*) See *ante*, 1550, 1551, 1552, 1558.

(*q*) The decision in this case must not be understood as at all qualifying the decision of the court of exchequer, *In re Ewin*, *ante*, 1637. On the contrary, it has been lately decided by the barons of the court (*In re Coales*, 7 M. & W. 390) that if a British born subject, domiciled in England, dies here and makes his will here, leaving assets in India, which are admin-

istered by his executor here, they are subject to the legacy duty, notwithstanding they were received in India and remitted to the executor here by an administrator *cum testamento annexo* appointed under an Indian grant of administration.

(*r*) See *Atty. Gen. v. Dunn*, 6 M. & W. 511.

(*s*) *Ante*, 1637.

(*t*) See *ante*, 1515 *et seq.*

case of *Thompson v. The Advocate General*. (*u*) There a British born subject died domiciled in a British colony. At the time of his death he was possessed of personal property locally situate in Scotland. Probate of his will was taken out in Scotland, for the purpose of there administering this property; and out of the fund thus obtained by the executor, legacies were paid to legatees residing in * Scotland. And it was held, on the principle above mentioned, that legacy duty was not payable in respect of these legacies. In the course of the discussion of this case, the following question was put by the house to the judges, viz: "A., a British born subject, born in England, resided in a British colony. He made his will, and died domiciled there. At the time of his death, he had debts owing to him in England. His executors in England collected these debts, and out of the money so collected paid legacies to certain legatees in England. The question is, are such legacies liable to the payment of legacy duty?" The judges were unanimously of opinion in the negative. And the house decided accordingly. This case was afterwards regarded by the court of exchequer in the *Attorney General v. Napier*, (*v*) as having definitely settled the principle above stated; and the barons decided accordingly a converse case; viz: that where the intestate was domiciled in England and the property abroad, it was liable to the duty.

Accordingly it has been held that succession duty is not payable on legacies given by the will of a person domiciled in a foreign country. (*w*)

So as to
succession
duty.

The same principle applies to cases where legacies are given in exercise of powers; for though in such cases the rule that the property follows the person can hardly be applied, yet the statute (36 Geo. 3, c. 52, s. 7) having put into one class legacies given by testators out of personal estate, or out of any personal estate they may have had power to dispose of, could not have intended that a dif-

The rule
applies to
legacies
given in
exercise of
powers by
testator
domiciled
out of Eng-
land:

(*u*) 12 Cl. & Fin. 1; S. C. 13 Sim. 153, [(Am. ed.) note (2) and cases.] See, also, accord. *The Commissioners of Charitable Donations v. Devereux*, 13 Sim. 14; *Chatfield v. Berchtoldt*, L. R. 12 Eq. Cas. 464; [1 *Jarman Wills* (3d Eng. ed.), 2, note (*f*) and cases cited.]

(*v*) 6 Ex. 217, 220.

(*w*) *Wallace v. Atty. Gen.* L. R. 1 Ch. VOL. III.

App. 1; *Callanane v. Campbell*, L. R. 11 Eq. Cas. 378. But see *In re Capdevielle*, 2 H. & C. 985; *Atty. Gen. v. Wahlstaff*, 3 H. & C. 374; *In re Badart's Trusts*, L. R. 10 Eq. Cas. 288, *contra*; [*Smithe's Will*, 12 W. R. 933; *Jopp v. Wood*, 4 De G., J. & Sm. 620; 1 *Jarman Wills* (3d Eng. ed.), 2, note (*f*) and cases.]

ferent rule should apply to different members of the class, and that duty should be payable by the appointees under the wills of donees of powers domiciled out of Great Britain, when no * duty would be payable by legatees under the wills of those persons to but not to be paid out of their personal estates. (x) But the rule succession duty. is different as to succession duty on testamentary appointments under English instruments. (y)

(x) In re Wallop's Trusts, 1 De G., J. & Sm. 656.

(y) Ib. See, also, In re Lovelace, 4 De G. & J. 340.

[1644]

* CHAPTER THE THIRD.

BY WHOM THE DUTIES ARE PAYABLE.

It will be observed, by referring to the statute 36 Geo. 3, c. 52, s. 6, that the duties, in all cases wherein it is not otherwise thereby provided for, must be paid by the executor or administrator, upon retainer for his own benefit, or for the benefit of any other persons, of any legacy or part of any legacy, or of the residue or any part of such residue, which he shall be entitled so to retain ; and also upon delivery, payment, or discharge of any legacy or residue, &c. to which any other person shall be entitled. (a) It is the duty of the executors to deduct the legacy duty when they pay the legacy, and if they do not do so, they are made personally responsible. (b)

By the statute 45 Geo. 3, c. 28, s. 5, (c) it is provided that the duties imposed on legacies charged upon, or made payable out of real estate, &c. shall be paid by the trustee or other person entitled to the real estate which is subject to the legacy, and that the duty shall be retained by the person paying such legacy, in like manner as is provided, respecting legacies out of personal estate, by the statute 36 Geo. 3. (d) In the case of *The Attorney General v. Jackson*, before stated, (e) the land out of which the legacy was payable had been devised to two persons in moieties ; the one moiety to the one for life, and the other moiety to the other in fee. And the court of exchequer held that both the parties, the tenant for life of the one moiety, and the tenant in fee of * the other, were liable to the crown for the payment of the legacy duty.

The collection of the succession duty is provided for by the 44th and five following sections of the statute 15 & 16 Vict. c. 51,

(a) See *ante*, 1556.(b) Per Parke B. In *re Sammon*, 3 M. & W. 386.(c) See *ante*, 1584.(d) See *ante*, 1555, 1556.(e) See *ante*, 1631.

[1645] [1646]

by which that duty is imposed. (*f*) And it will be observed, that by the interpretation clause, (*g*) the term "trustee" is to include an executor or administrator.

It was decided in *Hales v. Freeman*, (*h*) upon the construction of the legacy duty acts, that a trustee under a will, who had paid the legacy duty upon an annuity, charged on land, after the expiration of four years from the death of the testator, might recover the amount of duty so paid from the legatee, notwithstanding a previous assignment of the annuity by such legatee. (*i*)

But a question may arise, whether the legacies are not, by the terms of the will, to be paid in full, free of the legacy duty, so as to make it incumbent on the executor to retain the duty out of the residue, instead of deducting it from the payment to the legatee. (*k*)

In *Barksdale v. Gilliat*, (*l*) the testator directed all the legacies to be paid at the expiration of six months after his decease, *without any deduction*. And Lord Eldon held that the legatees were entitled to the full amount, and that the legacy duty must be paid by the executors. So in *Smith v. Anderson*, (*m*) the testator gave certain annuities, and directed them to be paid *without any deduction whatsoever*. And Sir John Leach M. R. held that the annuities should be paid clear of legacy duty, on the ground that, from the nature of * the property out of which the annuities were to be paid, there could be no deduction, except in respect of the legacy duty. His honor, in giving judgment said, that he admitted that it was to be stated as the fair result of Lord Eldon's judgment in the above case of *Barksdale v. Gilliat*, that his lordship considered that a direction to pay annuities without deduction would not extend to exempt the annuitants from the legacy duty, if, from the nature of the property out of which the annuities were payable, there was any other deduction to which the annuities might be subject. The correctness, however, of this

(*f*) See *ante*, 1605 *et seq.*

(*g*) See *ante*, 1587.

(*h*) 1 Brod. & Bing. 391 ; S. C. 4 Moore, 21.

(*i*) This case was recognized and acted on in *Stow v. Davenport*, 5 B. & Ad. 366 ; *Bate v. Payne*, 13 Q. B. 900. A purchaser from a legatee is not necessarily subject to the same liability as the legatee himself in

this respect. *Farwell v. Seale*, 3 De G. & Sm. 359.

(*k*) In such cases, no duty shall be chargeable on the money to be applied to the payment of the duty. See stat. 36 Geo. 3, c. 52, s. 21, *ante*, 1567.

(*l*) 1 Swanst. 562.

(*m*) 4 Russ. 352.

view of Lord Eldon's judgment was denied by Lord Brougham in *Louch v. Peters*, (*n*) and by Alderson B. in *Gude v. Mumford*. (*o*)

In *Dawkins v. Tatham*, (*p*) an annuity was given by a will *clear of all deductions*, and was directed to be paid out of certain sums of stock standing in the testator's name. And Sir L. Shadwell V. C. held that the executors were bound to pay the legacy, free from the legacy tax.

In *Stow v. Davenport*, (*q*) lands were devised to the use, among others, that M. A. F. should take, from and out of the same premises, an annuity or yearly charge of 500*l.* a year, to be paid *clear of all taxes and deductions*, remainder to S. for life, subject to the annuity. And the court of king's bench held that the annuity was to be paid clear of legacy duty, and was a charge upon the land; and consequently that S., who had entered into possession under the devise to him, and been compelled to pay the legacy duty * on the annuity, pursuant to 45 Geo. 3, c. 28, s. 5, could not recover it again from the annuitant. (*r*)

Again, in *Louch v. Peters*, (*s*) a testatrix gave to L. for his life an annuity or clear yearly sum of 500*l.*, to be paid and payable half yearly, out of real estate, *clear of all taxes and outgoings*. And it was held by Sir J. Leach M. R., and afterwards by Lord Brougham on appeal, that the annuitant took it clear of the legacy duty.

Further, in *Courtoy v. Vincent*, (*t*) a testator directed his executors and trustees to pay certain annuities and legacies *clear* of the property tax, and *all expenses attending the same*. And it was held by Sir T. Plumer M. R. that the legacy duty ought to be paid out of the assets of the testator, and that the annuitants and

(*n*) *Post*, 1648.

(*o*) *Post*, 1648.

(*p*) 2 Sim. 492. It must be observed, that in the case already mentioned of *Hales v. Freeman*, 1 Brod. & Bing. 391, the court of C. P. held that a legatee, to whom an annuity was given "clear of all deduction," was compellable to refund the amount of the duty. But the point which might have been raised upon the construction of these words does not appear to have been noticed by either the bar or the bench; and the argument and de-

cision proceeded on a totally distinct ground.

(*q*) 5 B. & Ad. 359; S. C. Nev. & M. 805.

(*r*) But where an annuity is given "clear of all taxes and deductions," it is not to be paid free of property or income tax. *Wall v. Wall*, 15 Sim. 513; *Lethbridge v. Thurlow*, 15 Beav. 334. But see *Turner v. Mullineux*, 1 John. & H. 334.

(*s*) 1 My. & K. 489.

(*t*) 1 Turn. & R. 433.

legatees were entitled to receive the full amount of their respective legacies and annuities, without any deductions in respect of legacy duty.

So in *Godsden v. Dotterill*, (*u*) a testator bequeathed to his sister a legacy of 100*l.*, to be paid to her *free from all expense*; and it was held by Sir J. Leach M. R. that this legacy was to be paid discharged of duty.

Again, in *Gude v. Mumford*, (*v*) a testator devised to James Methere*ll*, for his life, "one annuity or *clear* yearly sum of 100*l.*" and charged his estates at Chobham with the payment of "the said annuity or yearly sum of 100*l.*" He then devised the estates at Chobham to trustees, in trust to levy and raise the annuity, and pay the same to James Methere*ll*; and subject thereto, and all costs, charges, and expenses attending the raising and paying the same, in trust for A. for life, with remainder to B. in fee. And Alderson B. held that James Methere*ll* was entitled to the annuity clear of all deductions for legacy duty, and that the residuary *estate was chargeable with the duty payable thereon. The learned baron observed; that it was clear, from the authorities on the subject, that if, from any directions contained in the will, an intention on the part of the testator can be collected that the legacy duty should be paid by the executor, the court will carry that direction into effect. And the learned judge denied that the view taken by Sir J. Leach, (*x*) of Lord Eldon's judgment in *Barksdale v. Gilliat*, was correct; but declared his opinion, that the right construction of it was, that Lord Eldon considered the words "without deduction," to mean, in their ordinary sense, "clear of all deduction," and then went on to examine, whether, in the four corners of the will, he could find the same words used in another sense, or in a more definite and limited sense; and whether, if he could find an intention to use them in a limited sense, he could carry that intention into effect; and upon the whole, he arrived at the conclusion, that the words must be used in their ordinary sense without qualification. (*y*)

But in *Foster v. Ley*, (*z*) where a testatrix bequeathed property in trust "to pay off the debts of her first husband, as it was her

(*u*) 1 My. & K. 56.

(*v*) 2 Y. & Coll. 448.

(*x*) See *ante*, 1646, 1647.

(*y*) See, also, accord. *Marris v. Burton*,

11 Sim. 167; *Ford v. Ruxton*, 1 Coll. 403;

Bailey v. Boulton, 14 Beav. 595; *Haynes v.*

Haynes, 3 De G., M. & G. 590; 19 Beav.

499; *Warbrick v. Varley*, 30 Beav. 241;

In re Coles's Will, L. R. 8 Eq. Cas. 271.

(*z*) 2 Bing. N. S. 269.

will that the same should be discharged," and the moneys remaining unexpended, to her nephew; the court of common pleas held that the creditors ought to pay the legacy duty upon their several debts; and that the matter having been overlooked in an order made by the court of chancery for the payment of the debts, the executors, who had paid the debts in full, and then paid the legacy duty, might recover the amount from the creditors respectively, in an action for money paid to their use.

Again, in *Sanders v. Keddell*, (*a*) a testatrix gave to trustees such a sum of money as that the annual produce * thereof, when invested in the funds, would produce the *clear* yearly sum of 500*l.*, upon trust to pay the annual produce to certain of her relations in succession for life, and afterwards, as to one fifth part, upon trust to pay it to M. C. Gascoigne for his life, and after his decease, to any wife who might survive him, during her life, and after the decease of the survivor of them, upon trust for his children. And Sir L. Shadwell V. C. held that the fund was not exempted from legacy duty; for that it appeared, from the language of the will, that the testatrix meant that what she had directed to be done should be done at once; that M. C. Gascoigne might or might not marry a relation of the testatrix, and his children might be related in some degree to the testatrix, or they might not; and, therefore, that the word "clear" must be taken to refer, not to the legacy duty, but to the expenses of investment and so on. (*b*) And this case was recognized and acted upon by Romilly M. R. in *Pridie v. Field*. (*c*)

Where one legacy is given by will free of duty, and by a codicil another is given in *substitution* of that given by the will, and upon the same trusts, the substituted legacy is also to be considered as given free from the duty; because, being a mere substitution, it is *prima facie* attended with the same incidents. So where a subsequent addition is made to a prior legacy, the addition will have the same qualities. (*d*)

(*a*) 7 Sim. 536.

(*b*) In this case the testator did not use the words "clear of all deductions," and besides, the parties were to take in succession. 11 Sim. 163, per Shadwell V. C. Where a legacy, the fund being in court, was assigned by a deed which represented that it was *unincumbered*, it was

held that the legacy duty did not constitute an "incumbrance." *Bliss v. Putnam*, 7 Beav. 40.

(*c*) 19 Beav. 497.

(*d*) By Sir J. Leach V. C. 6 Madd. 31. See the cases collected, *ante*, 1295, 1296, note (*h*); *post*, 1651, note (*i*).

Thus, in *Cooper v. Day*, (e) the testator gave to his widow 800*l.*, payable within three months from his death, and free from legacy duty. He also gave 4,000*l.* to trustees, payable to them within the same period, free from legacy duty, in trust for his two daughters, to be paid at twenty-one, with *intermediate interest for their maintenance. By a codicil, the testator bequeathed to his wife an additional sum of 200*l.*, free from legacy duty. He also revoked the legacy of 4,000*l.*, and in substitution gave in trust for his daughters 5,000*l.*, "upon the trusts, and to and for the same intents and purposes, and under and subject to the same powers, provisos, and limitations as expressed in his will concerning the legacy of 4,000*l.*" By a second codicil the testator revoked the gift of 5,000*l.*, and gave in its place 6,000*l.* to the same trustees, upon the trusts, &c. following the words in the first codicil. The only question was, whether the legacy of 6,000*l.* was to be paid free of the legacy duty. And Sir William Grant declared, upon the authority of the cases of *Leacroft v. Maynard*, (f) and *Crowder v. Clowes*, (g) that the substituted legacy of 6,000*l.* was to be taken as exempted from the legacy duty, in like manner with the original legacy, in the place of which it was given. So in *Shaftesbury v. Marlborough*, (h) a testator by his will gave an annuity to his grandson, and directed the executors to pay the legacy duty on all the legacies and annuities given by his will. By a codicil, he gave an annuity to his grandson *in lieu of* the annuity given by his will. And Sir L. Shadwell V. C. held that the annuity given by the codicil was free from legacy duty; his honor observing, that when the thing bequeathed by a codicil is given as a mere substitution for that which is bequeathed by the will, it is to be taken with all its accidents. (i)

But in *Chatteris v. Young*, (j) the testator bequeathed to his daughter 50,000*l.*, of which 20,000*l.* was to be paid to her absolutely, and, as to the remaining 30,000*l.* she was to receive the interest to her separate use during her life, and, after her death, the principal was to be paid to such person *or persons as she might by her will appoint; and, after giving various other lega-

(e) 3 Meriv. 154.

(f) 3 Bro. C. C. 233; S. C. 1 Ves. jr. 279.

(g) 2 Ves. jr. 449, 450.

(h) 7 Sim. 237.

(i) See, also, accord. *Fisher v. Brierley*,30 Beav. 267; *Johnstone v. Lord Harrowby*, 1 De G., F. & J. 428, overruling S. C. Johns. 425.

(j) 2 Russ. 183.

cies, and bequeathing to the same daughter a share of the residue of his personal estate, he directed that all the specific and pecuniary legacies thereinbefore bequeathed should be paid to the respective legatees free of the legacy duty. The daughter having died in his lifetime, he afterwards, by a codicil, "instead of the legacies given to her by my will, which are now lapsed," bequeathed to her husband 20,000*l*. Sir John Leach V. C. decreed (*k*) that the husband was not entitled to have the 20,000*l*. paid to him free of legacy duty. And upon appeal to the lord chancellor, his lordship (Lord Lyndhurst) was of opinion that the legacy given to the husband by the codicil could not be considered as given by way of substitution for the legacy which the will had destined for his wife, but was an independent, distinct, substantive bequest. He therefore confirmed the judgment of the vice chancellor, and dismissed the appeal. (*l*)

In *Byne v. Currey*, (*m*) a testator, by his will, bequeathed certain legacies to charitable institutions, and directed that they should be paid as follows: "Which charitable legacies I direct may be paid out of my personal estate, prior to the payment of my debts, and the said legacies hereby by me given and bequeathed." He then directed "all his legacies to be paid within two years after his decease, free of any deduction for tax or duty." By a codicil, he bequeathed legacies payable and raisable immediately. And the court of exchequer held that the charitable legacies, and the legacies given by the codicil raisable immediately, were payable free from legacy duty. (*n*)

In *Douglas v. Congreve*, (*o*) a testator gave to M. S. 50,000*l*. three per cent. consols, to be transferred within *six months after his decease, and, after giving a variety of specific and pecuniary legacies, he directed that the duty upon all the pecuniary legacies thereinbefore bequeathed should be paid out of his general personal estate. And Lord Langdale M. R. held that the legacy of the stock was not a pecuniary legacy, and consequently not exempted under this clause of the will from the payment of legacy duty.

(*k*) 6 Madd. 30.

(*n*) See accord. *Williams v. Hughes*, 24

(*l*) See, also, *Burrows v. Cottrell*, 3 Sim. Beav. 474.

375; *Early v. Benbow*, *ante*, 9, note (*u*).

(*o*) 1 Keen, 410.

(*m*) 2 Cr. & M. 603; S. C. 4 Tyrwh. 479.

In *White v. Lake*, (*p*) a testator gave several pecuniary and specific legacies, and directed that "all legacies and bequests" by his will given, should be paid or satisfied free of duty, and he devised his residuary real estate to A. for life, and afterwards upon trust for sale; and Lord Romilly M. R. held, upon the ordinary meaning of the words "legacies and bequests," and also upon the general construction of the will, that the legacy duty which would become payable on the proceeds of the real estate, was not payable out of the personal estate.

In *Lord Londesborough v. Somerville*, (*q*) the testator directed legacy duty to be paid out of his general personal estate on the annuities and pecuniary legacies given by the will. And it was held by Romilly M. R. that the income of residuary uninvested personal estate directed to be invested in land and settled to uses, was not an annuity within such direction. (*r*)

* In *Noel v. Lord Henley*, (*s*) a legacy was bequeathed to be paid out of the rents and profits, and the produce of the sale of a real estate devised to be sold for the payment of such legacy, *inter alia*. In a subsequent part of the will, this legacy was directed by a general clause, extending to all the legacies before given, to be paid in full, free of the duty. And the court of exchequer held that the duty on that particular legacy must be paid out of the real fund, and not out of the personality; the exemption from the duty being an augmentation of the legacy, and therefore payable out of the specific fund. (*t*)

(*p*) L. R. 6 Eq. Cas. 188.

(*q*) 19 Beav. 295.

(*r*) In *Calvert v. Selbon*, 2 Keen, 672, a testator bequeathed some specific chattels and a sum of 200*l.* to A., and he directed his executors to invest in the funds such a sum as would produce 200*l.* a year, clear of the legacy duty, and all other deductions, which annual sum was to be paid to A. for her life, and after her decease the principal was to be paid to other parties; and the testator directed his executors to pay the legacy duty on the specific and pecuniary legacies and yearly sum given to A.; A., and the legatees in remainder,

Exemption of legatee for life extended to legatees in remainder.

were strangers in blood to the testator; so that the same rate of duty was chargeable on the whole bequest, and the full amount of the duty payable at once (see *ante*, 1561, 1562). And Lord Langdale M. R. held that the legacy duty was payable out of the testator's residuary estate, both in respect to the interest given to A., and to those in remainder; inasmuch as the residuary legatee could not on A.'s death call back any part of the duty that had been paid.

(*s*) 7 Price, 241; S. C. in Dom. Proc. 12 Price, 213.

(*t*) See, also, *Stow v. Davenport*, *ante*, 1647.

* PART THE FOURTH.

OF THE LIABILITIES OF AN EXECUTOR OR ADMINISTRATOR.

BOOK THE FIRST.

OF ASSETS.

HAVING investigated in a former part of this work the quantity of the estate which devolves to an executor or administrator, it remains, 1st, to consider what portion of that property is regarded in law as applicable by him to the satisfaction of the different claimants on the estate in his hands, as well upon valuable consideration as volunteers; and 2dly, to complete the examination already commenced in an earlier stage of this treatise, (a) of the order in which that application must be made, with reference to the priority subsisting among the claimants.

The property which will be the subject of these two inquiries, is called *assets* in the hands of the executor or administrator, that is, sufficient, from the French *assez*, to make him chargeable to a creditor, and a legatee or party in distribution, so far as such property extends.

This portion of the estate of the deceased is sometimes designated by the older writers by the term "*assets enter mains*," in contradistinction to "*assets per descent*," by which last expression is denoted that portion which descends to the heir, and which is sufficient to charge him, as far as it goes, with specialty debts of his ancestor.

(a) *Ante*, 988 *et seq.*

* CHAPTER THE FIRST.

OF PERSONAL ASSETS, LEGAL OR EQUITABLE.

THE general rule, with respect to what shall be said to be assets in the hands of an executor or administrator to charge him, is thus laid down in a book of authority. (*b*) "All those goods and chattels, actions and commodities, which were of the deceased in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor or administrator doth get into his hands as duly belonging to him in the right of his executorship or administratorship, and all such things as do come to the executor or administrator in lieu or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator to make him chargeable to a creditor or legatee." (*b*¹)

(*b*) Touchst. 496.

(*b*¹) [*De Valengin v. Duffy*, 14 Peters, 282; *Montgomery v. Armstrong*, 5 J. J. Marsh. 175; *Paff v. Kinney*, 1 Bradf. Sur. 1; *Gray v. Swain*, 2 Hawks, 15. Money received by an executor or administrator from the government of the United States, by means of a treaty with a foreign nation, as an indemnity for loss of property taken from the deceased by such foreign nation, is to be administered as assets of the estate of the deceased. *Foster v. Fifield*, 20 Pick. 67; *Thurston v. Doane*, 47 Maine, 79; *De Valengin v. Duffy*, 14 Peters, 282; *Rogers v. Hosack*, 18 Wend. 319; *Thurston v. Lowder*, 40 Maine, 197. Interest collected on debts due the estate is assets. *Ray v. Doughty*, 4 Blackf. 115. As to letters received by the testator or intestate, *post*, 1900, and note. An administrator should not be charged with sums advanced by the intestate. *French v. Davis*, 38 Miss. 167. Advancements are not assets to be administered upon. See *ante*, 1498, note (*h*),

1502, note (*a*). As to rents accruing before, and rents accruing after, the death of the testator or intestate, see *ante*, 817, and note (*c*¹), and cases cited, 820, and note (*o*). Debts due to the estate of a testator, from the executor named in his will, and from a firm of which he is a member, are to be treated and accounted for as assets; and so as to debts due the estate from a person appointed administrator of the intestate. See *ante*, 1310, notes (*i*) and (*k*¹), and cases there cited. In Massachusetts, when the personal estate of the deceased is insufficient to pay his debts and the charges of administration, the real estate left by him, so far as necessary, may be sold for that purpose, by the executor or administrator, under license from the probate court; and the proceeds of the real estate so sold shall be deemed assets in the hands of the executor or administrator in like manner as if the same had originally been part of the goods and chattels of the deceased. Genl. Sts. c. 96, §§ 7, 8. See, further, *ante*, 650, note (*d*¹); *Whitney v. Whitney*, 14 Mass. 88;

There are many instances in which property in the hands of an executor is regarded as assets, although it was never in the testator. Thus, if an executor renew a lease, he shall account for the new lease, as well as the old, as assets. (c) So if A. covenants with B. to make him a lease of certain land, by such a day, and B. dies before the day, and before any lease made, A. is bound to make the lease to the executor of B., and the lease so made shall be assets in his hands; or if A. refuses to grant the lease, he is liable to make the executor a compensation in damages, which are also assets. (d) * So, if A. promises, on good consideration, to deliver to B. by such a day certain wares or merchandises, and this is not performed in the life of B., but delivery is made to his executor, the goods will be assets in his hands, as well as the money recovered in damages for not performing would have been. (e)

Leverett v. Armstrong, 15 Mass. 26; *Dean v. Dean*, 3 Mass. 258; *Drinkwater v. Drinkwater*, 4 Mass. 353; *Haines v. Price*, 1 Spencer, 480; *Vanscyckle v. Richardson*, 13 Ill. 171. Mortgaged premises and the debt secured thereby are to be considered personal assets in the hands of the executor or administrator of the deceased mortgagee, or of the deceased assignee of such mortgagee. Genl. Sts. Mass. c. 96, § 9; *ante*, 650, note (d¹), 687; note (z). As to the power of an executor or administrator over real estate held by him in mortgage, or taken by him on execution for a debt due the deceased, both before and after the right of redemption is foreclosed, see *ante*, 650, note (d¹). As to lands descended, or personal property found in another state, see *Austin v. Gage*, 9 Mass. 395; *Governor v. Williams*, 3 Ired. 52; *Peck v. Mead*, 2 Wend. 470; *post*, 1661. As to buildings erected by the intestate on the land of his wife or another person, see *Washburn v. Sproat*, 16 Mass. 449. As to leases for years, see *ante*, 673. The price of real estate received by the administrator from a sale ordered for the payment of debts is assets. *Vaughan v. Deloatch*, 65 N. Car. 378. Railroad stock is personal assets. *South Western R. R. Co. v. Thomason*, 41 Geo. 408.]

(c) *Anon.* 2 Chanc. Cas. 208; *Bromfield*

v. Chichester, 2 Dick. 480; *James v. Dean*, 11 Ves. 392; *Randall v. Russell*, 3 Meriv. 190. See, also, *Fitzroy v. Howard*, 3 Russ. 225; *Giddings v. Giddings*, *Ib.* 241; *Fosbrooke v. Balguy*, 1 My. & K. 226.

(d) *Wentw. Off. Ex.* 188, 14th ed.; *Chapman v. Dalton*, *Plowd.* 286; *Com. Dig. Assets, C.* [Damages assessed in favor of the owner of land through which a highway had been laid out during the owner's lifetime, but which were not payable until a future day, which occurred after the owner's death, are assets in the hands of his executor. *Welles v. Cowles*, 4 Conn. 182; *Goodwin v. Milton*, 25 N. H. 458; *Astor v. Hoyt*, 5 Wend. 603. See *Neal v. Knox & Co. R. R. Co.* 61 Maine, 298. Salary voted to a person after his decease, and paid to his executor, is assets of the estate in his hands. *Loring v. Cunningham*, 9 Cush. 87. A dividend of tolls collected by a turnpike company, before the death of a stockholder, is personal estate in the hands of his executor. *Welles v. Cowles*, 4 Conn. 182. Money recovered upon an appeal bond, given to the obligees as executors, on an appeal from a judgment obtained by them in that character, will be assets in their hands. *Sasser v. Walker*, 5 Gill & J. 102.]

(e) *Wentw. Off. Ex.* 188, 14th ed.; *Com. Dig. Assets, C.*

Again, chattels which were never vested in the testator in possession, but accrue to the executor by remainder, will be assets in his hands. Thus, if a lease be made to one for life, remainder to his executor for years, (*f*) such remainder will be assets in the hands of the executor, though it were never in the testator. (*g*) So, where a lease for years is bequeathed to A. for life, and afterwards to B., who dies before A., although B. never had this term in him, it shall be assets in the hands of his executor. (*h*) So, a remainder in a term for years, though it never vested in the testator's possession, and though it still continue a remainder, shall be assets in the hands of the executor; for it bears a present value, and is vendible. (*i*)

So, goods which have accrued by increase since the testator's death are assets in the hands of the executor. (*i*¹) Thus, if the sheep or other cattle of the testator bear lambs, &c. after the testator's death, these, although never the property of the testator, will be assets. (*j*) So, if the executor of a lessee for years enter into the tenements, the profits, over and above the rent, shall be assets. (*k*) Therefore, if an executor has a lease for years of land of the value of 20*l.* a year, rendering rent of 10*l.* a year, it is assets in his hands only for 10*l.* over and above the rent. (*l*) Again, if an *executor employ the testator's goods in trade, the profits shall be assets. (*m*) And whether the executor takes upon himself to carry on the testator's trade, or does so in pursuance of a provision in articles of partnership entered into by

(*f*) See *ante*, 697 *et seq.*

(*g*) Wentw. Off. Ex. 189, 14th ed.; Com. Dig. Assets, C.

(*h*) *Ib.*

(*i*) *Ib.* [See *Whitney v. Whitney*, 14 Mass. 88; *Leverett v. Armstrong*, 15 Mass. 26.]

(*i*¹) [*Post*, 1966, note (*t*). Any savings or accumulations out of the estate, by an executor or administrator, become assets, to be dealt with as other assets are. *Wingate v. Pool*, 25 Ill. 118; *Genl. Sts. Mass.* c. 98, § 2. This applies to interest received by him, and also revenues of the estate confided to him. *Soldini v. Hyams*, 15 La. Ann. 551.]

(*j*) Wentw. Off. Ex. 190, 14th ed.

(*k*) *Buckley v. Pirk*, 1 Salk. 79; Went.

Off. Ex. 190, 191, 14th ed.; [*Stagg v. Jackson*, 1 Comst. 206.] But the profits, as far as the amount of the rent, are received by the executor as tertenant, and appropriated to the use of the lessor. 1 Salk. 79. See *post*, pt. iv. bk. ii. ch. i. § 11.

(*l*) *Body v. Hargrave*, Cro. Eliz. 712; *Godolph.* pt. 2, c. 24, s. 1. A leasehold estate, though not sold, is assets *ad valorem*. *Jury v. Woodhouse*, Barnes, 333; *Vincent v. Sharpe*, 2 Stark. 507.

(*m*) *Godolph.* pt. 2, c. 24, s. 4; Com. Dig. Assets, C. See *infra*, pt. iv. bk. ii. ch. ii. § 11.; [*post*, 1841, 1842. An executor or an administrator will not be suffered to speculate on the estate. *Kellar v. Belor*, 5 T. B. Mon. 573.]

the deceased, (*n*) or by direction of the testator, contained in his will, or under the direction of the court of chancery, the profits of such trade shall be assets, for which he shall be accountable. Thus, in *Gibblett v. Read*, (*o*) Lord Hardwicke held that a share in a newspaper should be considered as the personal property of the deceased, transmissible to his representatives, and that the profits of printing the same subsequent to his death should be distributed accordingly. And his lordship said that there were many cases where no part of the property of a testator had been employed or made use of in carrying on the business, and yet the executor had been held accountable for the profits of the business, as the testator's personal estate; (*p*) as in the instance of physical secrets or nostrums, where everything was carried on with materials purchased after the testator's death, and yet the nostrum was part of the personal estate of the testator. (*q*) * So, in *Pitt v.*

(*n*) Generally speaking, the death of a partner, of itself, dissolves the partnership. *Vulliamy v. Noble*, 3 Meriv. 614; [*Murray v. Mumford*, 6 Cowen, 441; *Canfield v. Hard*, 6 Conn. 184; *Burwell v. Mandeville*, 2 How. (U. S.) 560; *Knapp v. M'Bride*, 7 Ala. 19; *Ames v. Downing*, 1 Bradf. Sur. 321; *Scholesfield v. Eichelberger*, 7 Peters, 586, 594; *Dyer v. Clark*, 5 Met. 575; *Martlett v. Jackman*, 3 Allen, 287.] And even where the partners have covenanted that they and their respective executors shall continue partners for a certain time yet unexpired, the executors of the late partner are entitled to a decree for a dissolution, subject to their liability to damages, recoverable in an action by the surviving partners, for a breach of the covenant. *Downs v. Collins*, 6 Hare, 418.

. (*o*) 9 Mod. 459.

(*p*) See, also, *Moseley v. Rendell*, L. R. 6 Q. B. 338; *Abbott v. Parfitt*, L. R. 6 Q. B. 346.

(*q*) His lordship further observed, that if the house of the testator were a house of great trade, the executor must account for the value of what is called the goodwill of it. See, also, *Worrall v. Hand*, Peake N. P. C. 74, acc. So an assignment by deed

of the goodwill of a trade has been held to be a conveyance of "property" within the stamp act. *Potter v. Commissioners of Inland Revenue*, 10 Ex. 147. But in *Spicer v. James*, Rolls, M. T. 1830, cited in *Collyer on Partnership*, 82, where an attorney having died intestate, another attorney, a friend of the family, by arrangement with the widow, took out administration, and continued the business of the deceased until her son came of age, paying the widow half the profits; Sir J. Leach held that the goodwill of a trade of a personal nature, as that of an attorney, was not a subject of administration, and was not assets in the hands of the administrator. [See, however, *contra*, *Smale v. Graves*, 3 De G. & Sm. 706.] With respect to the goodwill of a business, in which several are partners, it seems that as to a partnership between professional persons, on the death of one, the goodwill shall survive to the other, although the deceased paid a large premium on entering into the partnership. *Farr v. Pearce*, 3 Madd. 78. But whether this survivorship of the goodwill exists in the case of commercial partnerships has been questioned. In *Hammond v. Douglass*, 5 Ves. 539, Lord Loughborough determined that

Pitt, (*r*) the administratrix of a deceased ropemaker in the king's yard at Woolwich was cited in the prerogative court of Canterbury, to exhibit an inventory and account. The deceased had four apprentices; and the question was, whether the administratrix was bound to insert in the inventory the amount of the wages earned by them, in the yard of the deceased, since his death. And Sir G. Lee was clearly of opinion that she, who did not belong to the yard, could have apprentices there only as administratrix to the deceased; and the learned judge accordingly *decreed her to charge herself with the profits arising from the apprentices.

So chattels, real or personal, to which the executor becomes by condition: entitled, after the death of the testator, by force of a condition, will be assets. As where a lease for years, or cattle, plate, or other chattel, was granted by the testator, upon condition that if the grantee did not pay such a sum of money, or do other acts, &c. and this condition is broken or not performed after the testator's death, the chattel will be brought back to the executor, and be assets. (*s*) The law is the same where the condition is that the testator shall pay money or do any other act to avoid the grant. Accordingly, it has been decided that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets in the hands of the executor, for so much as they are worth beyond the sum paid on their redemption. (*t*) And it was held

the goodwill of a trade carried on in partnership without articles, survives, and is not partnership stock. But in *Crawshay v. Collins*, 15 Ves. 227, Lord Eldon doubted the propriety of that decision. See, also, *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Wedderburn v. Wedderburn*, 22 Beav. 84, 104, in which last case it was laid down by Romilly M. R. that the goodwill does not survive unless by express agreement. See, also, accord. *Smith v. Everett*, 27 Beav. 446. But though these cases establish that the goodwill is a valuable and tangible thing in some cases, yet the legatee of the share of the mere goodwill of a deceased partner cannot support a bill against the surviv-

ing partner to obtain the benefit of his legacy, even after assent by the executor. *Robertson v. Quiddington*, 28 Beav. 529. In a suit for the general administration of assets, if it be ascertained that the executors have been able so to deal with the business as to make something of the goodwill, the legatee may have a right to be paid in respect of his interest in it. *Ib.* Other cases on the subject of the goodwill of a partnership business will be found collected and commented on in the *Jurist* of December 2, 1865.

(*r*) 2 Cas. temp. Lee, 508.

(*s*) Wentw. Off. Ex. 181, 14th ed. [See *ante*, 1656, note (*b*¹).]

(*t*) Wentw. Off. Ex. 182, 14th ed.;

at N. P. by Abbott C. J. (*u*) that a lease which belonged to an intestate, upon which the plaintiff had a lien, on account of which he retained it in his hands, was nevertheless to be considered as assets in the hands of the administrator, who had the power to redeem it. But if the executor redeem with his own money the goods * pledged by the testator, he shall be indemnified in respect to the sum he has disbursed out of the effects of the testator, or, if necessary, by the sale of the chattel itself; and in that case the surplus over and above such indemnity shall be assets. (*x*) In case he have no fund as executor, and he advance the money out of his own purse for the redemption, and it be fully equivalent to the value of the chattel, the property is altered by such payment, and shall be vested in the executor as a purchaser in his own right. (*y*) But if the executor redeem the chattel after the time specified for redemption is elapsed, then it is said that the chattel, without any distinction in respect to its value, shall at law belong to the executor in his own right; since in such case it must be deemed to be sold to him by the mortgagee or pawnee, who, after the forfeiture is incurred, has a legal right to dispose of it at his pleasure to him, or to any other person. But in equity the excess in the value of the thing beyond the money paid for the redemption shall be regarded as assets in the hands of the executor. (*z*)

“Assets in any part of the world,” says the author of the Touchstone, (*a*) “shall be said to be assets in every part of the world.” So it was laid down by Lord Lyndhurst, in delivering the judgment of the barons of the ex-
property of the testator shall be assets in whatever

Hawkins v. Lawse, 1 Leon. 155; *Harcourt v. Wrennan*, or *Harwood v. Wrayman*, Moore, 858; 1 Roll. Rep. 56, pl. 32; 1 Brownl. 76; 1 Roll. Abr. 920, G. pl. 5; *Alexander v. Lady Gresham*, 1 Leon. 225. A testator being indebted to R., deposited with him a policy of insurance on the testator's life, as security for the debt, and for a further advance then made by R.; and died, leaving R. and M. his executors. R., still holding the policy, applied to the insurers for the amount due on it (200*l.*), which they refused to pay unless R. and M. gave a receipt for it as executors. They did so, R. making protest that he signed as executor, merely to satisfy the

insurers. In an action by a judgment creditor, the executors pleaded *plene administraverunt* except as to 4*l.* (the surplus out of the 200*l.* after payment to R.). And the court of K. B. held that the executors were not chargable with the 200*l.* as assets, but only with the surplus after payment to R. *Glaholm v. Rowntree*, 6 Ad. & El. 710.

(*u*) *Vincent v. Sharp*, 2 Stark. N. P. C. 507.

(*x*) *Wentw. Off. Ex.* 182, 14th ed.

(*y*) *Anon. Dyer*, 2 *a*, pl. 3; *Wentw. Off. Ex.* 182, 14th ed.

(*z*) *Wentw. Off. Ex.* 186, 187, 14th ed.

(*a*) *Touchst.* 496.

part of the world they are situate: chequer in *The Attorney General v. Dimond*, (*b*) that “the effects of the testator are assets wherever situated, whether at home or abroad; and such effects as are in a foreign country at the time of the testator’s death, although they remain and are wholly administered there by the executor, are equally assets. Again, it was laid down by Bayley B. in the case *In re Ewin*, (*c*) that if the testator or intestate dies entitled to stock in the French or other foreign funds, and there is a deficiency of *assets in this country to meet the debts of the deceased, it is the duty of the executor or administrator to sell the stock, and bring the proceeds into this country, in order to satisfy the creditors; and if he neglects to do so, he will be guilty of a *devastavit*. (*d*) Accordingly, as early as the reign of James 1, in *Dowdale’s case*, (*e*) where the jury found that assets within the kingdom of Ireland came to the hands of the executor, it was resolved that the finding the assets to be beyond sea, was surplusage; for that if executors have goods of their testators in any part of the world, they shall be charged in respect of them; since many merchants and other men, who have goods to a great value beyond sea, are indebted here in England; and it would be a great defect in the law, that those goods should not be liable to their debts. (*e*¹)

But this doctrine has been questioned. In *Story’s Conflict of Laws*, (*f*) that eminent writer, in commenting on the resolution in *Dowdale’s case*, says, “This language, in its broad import, is certainly unmaintainable in our day; for it goes to the extent of making a domestic executor or administrator liable for all assets of the testator or intestate which are locally situate abroad; although (as it has appeared in an earlier part of this work), (*g*) he has not, in virtue of the domestic letters of administration, any

(*b*) 1 Cr. & Jerv. 370; S. C. 1 Tyrwh. 258; [*Atty. Gen. v. Bouwens*, 4 M. & W. 191, 192.]

(*c*) 11 Cr. & Jerv. 157; S. C. 1 Tyrwh. 107.

(*d*) So it has been laid down that a leasehold estate for years in Ireland is personal assets in England, and may be sold here by the executor. *Bligh v. Lord Darnley*, 2 P. Wms. 622. And where there was a question as to the quality of an estate in land situate in a foreign country, the court of chancery referred it

to a master, to inquire whether the testator’s interest in it was in its nature real or personal. *Gardiner v. Fell*, 1 Jac. & W. 24.

(*e*) 6 Co. 47 *b*; S. C. Cro. Jac. 55.

(*e*¹) [*Lord Abinger C. B.* in *Atty. Gen. v. Bouwens*, 4 M. & W. 171, 191, 192; *Bell J.* in *Taylor v. Barron*, 35 N. H. 484, 494; *post*, 1663, and notes (*g*¹) and (*h*¹).]

(*f*) Ch. xiii. s. 514 *a*.

(*g*) See *ante*, 364, 429; [*Stevens v. Gaylord*, 11 Mass. 256.]

authority to collect them, or to compel payment or delivery thereof to himself." (*g*¹)

In Dowdale's case, it will be observed, the foreign assets had actually come to the hands of the executor; so that the more general question, embraced by the terms of the resolution, did not, in truth, arise. But Mr. Justice Story doubts * the authority of the case, even in the aspect which the actual facts of it present; observing that according to the doctrine maintained in England in modern times, the executor was not at all liable to be sued in England as executor under letters testamentary taken out in Ireland; and *à fortiori* not for assets received and administered in Ireland under that appointment. And that learned commentator considers it as at least a doubtful question, whether if an executor or administrator, appointed in the country where the deceased died, should collect assets in a foreign country without obtaining a grant of administration there, the assets so received would constitute a part of the home assets which he would be bound to administer, and for which he would be liable to account under the domestic administration according to the domestic laws. (*g*²)

(*g*¹) [See *Tunstall v. Pollard*, 11 Leigh, 1.]

(*g*²) [Story Conf. Laws, § 514 *a*; *ante*, 362, note (*u*); *Morrill v. Morrill*, 1 Allen, 132; *Smith v. Smith*, 13 Ala. 329; *Taylor v. Barron*, 35 N. H. 496, points stated and cases cited. In *Atty. Gen. v. Bouwens*, 4 M. & W. 192, Lord Abinger C. B. said: "It is clear that the ordinary could administer all chattels within his jurisdiction; and if an instrument is created of a chattel nature, capable of being transferred by acts done here, and sold for money here, there is no reason why the ordinary or his appointee should not administer that species of property. Such an instrument is in effect a salable chattel, and follows the nature of other chattels as to the jurisdiction to grant probate. Let us suppose a case of a person dying abroad, all whose property in England consists of foreign bills of exchange, payable to order, which bills of exchange are well known to be the subject of commerce, and to be usually sold on the royal exchange. The only act of administration

which his administrator could perform here would be to sell the bills and apply the money to the payment of his debts. In order to make titles to the bills to the vendee, he must have letters of administration; in order to sue in trover for them, if they are improperly withheld from him, he must have letters of administration," &c. See *Willing v. Perot*, 5 Rawle, 264; *Shaw C. J. in Hutchins v. State Bank*, 12 Met. 421, 426. Notes are merely evidence of indebtedness; the property they represent is in the jurisdiction where the debtor is, not where the notes are. *Owen v. Miller*, 10 Ohio St. 136; *Slocum v. Sanford*, 2 Conn. 533; *Kohler v. Knapp*, 1 Bradf. Sur. 241. And it has been held that where the debtor and creditor reside in different states at the time of the death of the creditor, a payment made by the debtor in his own state, to the foreign administrator, is no bar to an action for the same debt, brought by a domestic administrator subsequently appointed. *Young v. O'Neil*, 3 Sneed (Tenn.), 55. It has been held that an executor or administra-

It has certainly been established (as there has already been occasion to show), (*h*) that although where different administrations are granted in different countries, that administration is deemed the principal or primary one which is granted in the country of the domicil of the deceased, (*h*¹) yet each portion of the estate must be administered in the country in which possession of it is taken and held under lawful authority. (*h*²) And that the administrator under a foreign grant has a right to hold the assets received under it against the home administrator, even after they have been remitted to this country. (*i*) The only mode, it seems,

tor is not chargeable in one state with moneys received for rents and profits of real estate in another state. *Morrill v. Morrill*, 1 Allen, 132; *Smith v. Smith*, 13 Ala. 329.]

(*h*) *Ante*, 430, 431.

(*h*¹) [*Leonard v. Putnam*, 51 N. H. 247; *ante*, 430, note (*g*); *post*, 1664, note (*l*¹). The administrator appointed at the place of domicil of the deceased is the principal administrator; and personal securities, in the possession and control of the intestate at the time of his decease, vest in him. He can do no legal act for their collection in another jurisdiction without an ancillary appointment there. And if another has already been appointed auxiliary administrator, the collection can be made, within that jurisdiction, only through him. But the principal administrator may always dispose of or collect such securities, if he can do so without being obliged to resort to the domicil of the debtor. *Hutchins v. State Bank*, 12 Met. 421, 425, 426; *Trecothick v. Austin*, 4 Mason, 33. Having possession of, and a legal title to the instrument, or evidence of the demand, and finding the debtor or his property within the jurisdiction of his appointment, he may enforce it there, without the necessity of any resort to the foreign jurisdiction. The debtor is equally responsible in either, if means of enforcing payment can be reached. *Wells J. in Merrill v. New England Mut. Life Ins. Co.* 103 Mass. 245, 248. See *ante*, 362, note (*u*).]

(*h*²) [See *Keaton v. Campbell*, 2 Humph.

224. Property legally situated within one state at the time of the death of the testator or intestate, and already disposed of and administered in its courts by its laws, cannot be affected by administration or the want of it in another state to which a legatee carries it after being delivered to him by order of the probate court. *Wells v. Wells*, 35 Miss. 638; *Suarez v. The Mayor &c.* 2 Sandf. Ch. 173; *ante*, 433, note (*g*).]

(*i*) *Ante*, 430, 431, 433, 1517; *Story's Confli. ch. xiii. s. 518*; [*Carmichael v. Ray*, 5 Ired. Eq. 365; *Taylor v. Barron*, 35 N. H. 496; *ante*, 362, note (*u*); *Williams v. Williams*, 5 Md. 467.] See, however, *Sandiland v. Innes*, 3 Sim. 263. In that case it appeared that *Erskine Nimmo* died intestate at Madras; and *William Fairlie*, a creditor of the deceased, took out letters of administration to him in the supreme court there. *Fairlie* afterwards came to England, and obtained letters from the prerogative court of Canterbury. Afterwards, one of the intestate's next of kin procured the latter administration to be revoked, and letters to be granted to himself. He then filed a bill against *Fairlie*, praying for an account of the effects of the intestate, both in India and in this country, which had been possessed by *Fairlie*. It was objected, that the bill being filed by the plaintiff in the character of personal representative only of the deceased, and not also as one of the next of kin, he was not entitled to sue for an account of the assets of the deceased possessed by *Fairlie* in India, but only of

of reaching such *assets is to require their transmission or distribution, after all the claims against the foreign administration have been duly ascertained or settled. (*k*) Again, though the right of the home executor or administrator to an ancillary probate or grant of administration in a foreign country is usually admitted, by the comity of nations, as a matter of course, (*l*) yet this new administration is made subservient to the rights of creditors and other claimants resident within the country where it is granted; (*l*¹) and the *residuum* is transmissible to the country of

the assets possessed by him in this country. Sir L. Shadwell V. C. said that if Fairlie had brought any of the intestate's assets from India to this country, the plaintiff would clearly be entitled to have an account taken as to them; and that the taking of that account would, incidentally, made it necessary to have an account taken of all the assets possessed by Fairlie or his agents in India. See, also, *Hervey v. Fitzpatrick*, Kay, 421; *ante*, 433; *Maclaren v. Stainton*, 16 Beav. 279.

(*k*) Story's Conf. ch. xiii. s. 518; *ante*, 990. [If, after the payment of debts, and expenses in the place of ancillary administration, there is a surplus remaining in the hands of the ancillary administrator, the tribunal in which the ancillary proceedings are pending will order him to pay it over to the executor or principal administrator; the only way in which the principal and ancillary administrators can legally have any dealings with each other will be under such an order. It is in effect the only way in which they can know each other officially. *Chapman J. in Low v. Bartlett*, 8 Allen, 259, 263, 266; *Probate Court v. Kimball*, 42 Vt. 320. See *ante*, 362, note (*u*); *Lynes v. Coley*, 1 Redf. Sur. 407; *Banta v. Moore*, 2 McCarter (N. J.), 101, and note (*m*) below; *Carmichael v. Ray*, 5 Ired. Eq. 365; *Ela v. Edwards*, 13 Allen, 48.]

(*l*) See *ante*, 362, 430.

(*l*¹) [It seems to be generally settled, that the debts due to creditors who are citizens of the government where the ancillary administration exists, shall be paid

by the ancillary administrator — the surplus only being transmitted to the place of the principal administration — and that in case of insolvency the assets in his hands are to be distributed among them. *Parker C. J. in Goodall v. Marshall*, 11 N. H. 88, 91; *Richards v. Dutch*, 8 Mass. 506; *Dewey J. in Fay v. Haven*, 3 Met. 109, 114; *Low v. Bartlett*, 8 Allen, 259, 263; *Dawes v. Head*, 3 Pick. 145; *Davis v. Estey*, 8 Pick. 475; *Porter v. Heydock*, 6 Vt. 374; *Churchill v. Boyden*, 17 Vt. 319; *Dawes v. Boylston*, 9 Mass. 337; *Boston v. Boylston*, 4 Mass. 318, 324; *Stevens v. Gaylord*, 11 Mass. 256; *Harvey v. Richards*, 1 Mason, 381, 421; *Carmichael v. Ray*, 1 Richardson, 116; *Mothland v. Wireman*, 3 Penn. 185; 2 Kent, 431. And in *Goodall v. Marshall*, 11 N. H. 88, it was held that the ancillary administration, operating only upon the property within the government where it is taken out, is, throughout its whole proceedings, so far as creditors are concerned, to be governed by the law of the place. "If the debts are provided or in the place of the ancillary administration," says *Parker C. J. in the above case*, "the mode of payment under that administration must be regulated by the *lex loci rei sitæ* So far as administration is had of the property in any particular government, it must be according to the *lex loci*. This is uniformly, and it may be said necessarily, so in the granting of the administration, the collection of the debts due the estate, the conversion of the property into money, and the settlement of the account of administration. No nation or state is

the original administration only when a final account has been

believed, in these particulars, to act with reference to the foreign law of the domicile of the deceased. . . . If there be any conflict in the laws of the two places, the government which provides for and sustains the ancillary administration, if it retains the assets for distribution among those of its own citizens who are creditors of the estate, will of course provide for their payment according to its own laws." See *Partington v. Atty. Gen.* L. R. 4 H. L. 100. And in *Low v. Bartlett*, 8 Allen, 259, 263, Chapman J. said: "Each state regulates for itself exclusively the manner in which the estate found within its limits shall be settled." See per Dewey J. in *Fay v. Haven*, 3 Met. 116; *Topham v. Chapman*, 1 Const. (S. Car.) 292; *Mothland v. Wireman*, 3 Penn. 185; *Harrison v. Sterry*, 5 Cranch, 299; *Milne v. Moreton*, 6 Binney, 353, 361; *Olivier v. Townes*, 14 Martin, 93, 99; *Miller's Estate*, 3 Rawle, 312; *McElmoyle v. Cohen*, 13 Peters, 312; *Smith v. Union Bank of Georgetown*, 5 Peters, 518; *De Sobry v. De Laistre*, 2 Harr. & J. 193, 224; *Holmes v. Remsen*, 20 John. 265. Questions have frequently arisen, and in many cases been discussed with great learning and ability, regarding the method to be pursued in distributing the assets belonging to the estate of a person deceased, where there are two or more separate administrations, creditors in each jurisdiction, and an actual insolvency. One of the most important cases upon this subject is that of *Dawes v. Head*, 3 Pick. 128, in which (pp. 145-148) Parker C. J., having stated the question to be, whether the funds collected in Massachusetts by an ancillary administration should be appropriated to the payment of such debts as might be regularly proved in Massachusetts, notwithstanding it was made to appear that the whole estate was insufficient to pay all the debts, and that the effects in Massachusetts were wanted by the executor abroad, to enable him duly to administer the estate, proceeded to say: "In relation

to the effects found within our jurisdiction, and collected by the aid of our laws, a regard to the rights and interests of our citizens requires that those effects should be made answerable for debts due them, in a just proportion to the whole estate of the deceased and all the claims upon it wherever they may be. In the several cases which have come before this court, where the legal character and effects of an ancillary administration have been considered, the intimations have been strong that the administrator here shall be held to pay the debts due to our citizens. In all these cases, however, we must suppose the court had reference to a solvent estate, and in such case there seems to be no question of the correctness of the principle; for it would be but an idle show of courtesy to order the proceeds of an estate to be sent to a foreign country, the province of Bengal for instance, and oblige our citizens to go or send there for their debts, where no possible prejudice could arise to the estate, or those interested in it, by causing them to be paid here. . . . In regard to effects thus collected within our jurisdiction, belonging to an insolvent estate of a deceased person having his domicile abroad, the question may be more difficult. We cannot think, however, that in any civilized country advantage ought to be taken of the accidental circumstance of property being found within its territory, which may be reduced to possession by the aid of its courts and laws, to sequester the whole for the use of its own subjects or citizens, where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government. Under the English bankrupt system, foreigners as well as subjects may prove their debts and share in the distribution; . . . and no reason can be suggested why so honest and just a principle should not be applied in the case of insolvent estates of deceased persons. It is

settled in the proper tribunal where the new administration is

always practised upon in regard to persons dying within our jurisdiction, having had their domicile here; that is, creditors of all countries have the same rights as our own citizens to file their claims and share in the distribution. There cannot be then a right in any one or more of our citizens, who may happen to be creditors, to give the whole of the effects which may be found here, or claim an appropriation of them to the payment of their debts, in exclusion of foreign creditors. . . . Shall, then, the effects collected here belonging to an insolvent estate in a foreign country be sent home in order to be appropriated according to the laws of that country? This would often work great injustice, and always great inconvenience to our own citizens, whose debts might not be large enough to bear the expense of proving and collecting them abroad; and in countries where there is no provision for an equal distribution, the pursuit of them might be wholly fruitless. As in Great Britain, our citizens, whose debts would generally be upon simple contract, such as bills of exchange, promissory notes, accounts, &c. would be postponed to creditors by judgment, bond, &c. and even to other debts upon simple contract which might be preferred by the executor or administrator. It would seem too great a stretch of courtesy to require the effects to be sent home and our citizens to pursue them under such disadvantages. What, then, shall be done to avoid, on the one hand, the injustice of taking the whole funds for the use of our citizens to the prejudice of foreigners, when the estate is insolvent, and on the other, the equal injustice and greater inconvenience of compelling our own citizens to seek satisfaction of their debts in distant countries? The proper course would undoubtedly be, to retain the funds here for a *pro rata* distribution according to the laws of our state among the citizens thereof, having regard to all the assets, either in the hands of the principal administrator or

of the administrator here, and having regard also to the whole of the debts which by the laws of either country are payable out of those assets, disregarding any fanciful preference which may be given to one species of debt over another, considering the funds here as applicable to the payment of the just proportion due to our own citizens; and if there be any residue, it should be remitted to the principal administrator, to be dealt with according to the laws of his own country, — the subjects of that country, if there be any injustice or inequality in the payment or distribution, being bound to submit to its laws. The only objection which can be made to this mode of adjusting an ancillary administration upon an insolvent estate is, the difficulty and delay of executing it. . . . The administrator here should be held to show the condition of the estate abroad, the amount of property subject to debts, and the amount of debts, and a distribution could be made upon perfectly fair and equitable principles. The delay would undoubtedly be considerable, but this would not be so great an evil as either sending our citizens abroad, upon a forlorn hope, to seek for the fragments of an insolvent estate, or paying the whole of their debts out of the property without regard to the claims of foreign creditors." The above suggestions, however, do not cover all, nor even the main difficulties that may arise. They do not cover the case, among others, where the assets collected in the ancillary administration are not sufficient to meet the *pro rata* payment required in the adjustment of the entire estate to the entire amount of debts. To render such an arrangement fair and equal it should be made certain that it would be mutual and reciprocal. There are, however, many cases in which the above principle of distribution has been favored or adopted. See *Davis v. Estey*, 8 Pick. 475; *Fay v. Haven*, 3 Met. 114; *Churchill v. Boyden*, 17 Vt. 319; *Miller's Estate*, 3 Rawle, 312; *Olivier v. Townes*, 14 Martin, 93. Some

granted, upon the equitable principles adopted by its own law, in

of the difficulties in applying the above rule were noticed by Parker C. J. in *Goodall v. Marshall*, 11 N. H. 88, 100, 101. Referring to it, the learned judge said: "Cases may exist in which this will prove a perfectly satisfactory rule, and accomplish an equal distribution among all legally entitled. But in other cases there may be great difficulty in its application. It holds the ancillary administrator to furnish evidence which he may have no means of procuring, for he has no control over the principal administrator. It may not accomplish the equality which is the great object to be attained by it; for if the estate in the hands of the principal administrator is greater in proportion to the claims there to be paid, than that in the hands of the ancillary administrator in proportion to the claims allowed under that administration, no decree can be made under the latter which will give the creditors there a *pro rata* distribution, unless their claims have been allowed under the principal administration also. It is only when the funds collected under the ancillary administration will give the creditors in that government as great a share as the others, that the equality sought is to be attained by that process. Another objection is, that if, by the laws of other governments, there are 'fanciful preferences' existing there, the rule cannot be made reciprocal in its operation; for in a case in which the ancillary administration exists there, and the principal one in a state where by the laws there is to be an equal distribution, the courts in which the ancillary administration proceeds must give effect to the preferences there allowed, whether they are regarded fanciful or otherwise; and in that case the surplus of the assets, over and above the ratable share of the creditors there, will not be transmitted to the place of the principal administration, that the creditors there may have an equal share. Besides, if there is anything here which should be distributed with reference to the

laws of another government, or with reference to the property which is to be disposed of by the operation of those laws, we can hardly regard the preferences they give as fanciful, or disregard the laws themselves, while we take into account the property on which they are to act." In the above case of *Goodall v. Marshall*, it was decided that where a person, domiciled in another government, dies, leaving property in New Hampshire, and an ancillary administration is taken in New Hampshire, and the estate represented insolvent, all the creditors of the deceased are entitled to prove their claims against the estate in New Hampshire, and to have the real as well as the personal estate appropriated in satisfaction of their demands. And the court also gave their opinion that where an estate is represented insolvent, all the creditors may pursue their claims, and have them allowed, in every government where administration is taken; for the purpose of availing themselves of all the estate of their debtor, until they have obtained payment of their debts. Standing upon the above positions, and referring to the rule above stated in *Dawes v. Head*, Parker C. J. in *Goodall v. Marshall*, *ubi supra*, further said: "It will deserve further consideration, when a case arises which shall require it, whether it is not the better rule to distribute the assets, under the ancillary administration, among all those who have entitled themselves to payment, or a dividend there, without reference to the amount of the estate, or claims elsewhere. So long as it is open for all to present and prove their claims, this rule will provide for as equal a distribution as the law permits. If creditors fail of obtaining a full share, through their own laches, they will have no cause of complaint." But see *Churchill v. Boyden*, 17 Vt. 319. Some of the difficulties in making distribution in the cases above suggested have been met and provided for by statute in some states. In Massachusetts it is pro-

the application and distribution of the assets found within its jurisdiction. (*m*)

vided that when administration is taken in that state on the estate of any person who was an inhabitant of any other state or country, if such person died insolvent, his estate found in Massachusetts shall as far as practicable be so disposed of that all his creditors in Massachusetts and elsewhere may receive each an equal share in proportion to their respective debts. To this end, his estate shall not be transmitted to the foreign executor or administrator, if there be one, until all his creditors who are citizens of Massachusetts have received the just proportion that would be due to them if the whole estate of the deceased wherever found, that is applicable to the payment of common creditors, were divided among all the creditors in proportion to their respective debts, without preferring any one species of debt to another; in which case no creditor who is not a citizen of Massachusetts shall be paid out of the assets found there, until all those who are citizens have received their just proportion as above provided. If there is any residue after such payment to the citizens of Massachusetts, it may be paid to any other creditors who have duly proved their debts there, in proportion to the amount due to each of them, but no one shall receive more than would be due to him if the whole estate were divided ratably among all creditors as above. The balance may be transmitted to the foreign executor or administrator; or if there is none, it shall, after the expiration of four years from the appointment of the administrator in Massachusetts, be distributed ratably among all creditors, both citizens and others, who have proved their debts in that state. Genl. Sts. c. 101, §§ 40, 41, 42. This statute secures the creditors in other states against any wrong from the courts of Massachusetts, where the balance of assets is in favor of the creditors in that state, but does not secure the creditors in Massachusetts against wrong from the

courts of any other state where the balance of assets is in favor of the creditors of such other state. A statute with similar provisions was passed in New Hampshire, in 1851. See the provisions of it stated, and the unfavorable comments upon it in *Taylor v. Barron*, 35 N. H. 484, 502.]

(*m*) Story's Conf. ch. xiii. s. 513; *ante*, 990; [*ante*, 362, note (*u*); 2 Kent, 434, note (*a*); *Jennison v. Hapgood*, 10 Pick. 77. It is very generally conceded, that when all the claims against the ancillary administration have been ascertained and finally settled, the court in which such administration is pending, may in its discretion order the balance to be sent to the principal administrator for distribution. See *Low v. Bartlett*, 8 Allen, 259, 264, 266; *Dawes v. Boylston*, 9 Mass. 337; *Probate Court v. Kimball*, 42 Vt. 320; *Wilkins v. Ellett*, 9 Wallace, 740; *Mackey v. Coxe*, 18 How.⁹ (U. S.) 100, 105; *Sanford v. Thompson*, 18 Geo. 554; *Banta v. Moore*, 2 McCarter (N. J.), 97; *Goodall v. Marshall*, 11 N. H. 88, 93; *Williams v. Williams*, 5 Md. 467; *Fay v. Haven*, 3 Met. 114; *Dawes v. Head*, 3 Pick. 128, 147, 148; *Davis v. Estey*, 8 Pick. 475; *ante*, 1515, note (*u*); 362, note; *Stevens v. Gaylord*, 11 Mass. 256, 264; *Harvey v. Richards*, 1 Mason, 381; *De Couche v. Savetier*, 3 John. Ch. 190, 210; *Jennison v. Hapgood*, 10 Pick. 77, 100; *Gravillon v. Richard*, 13 La. 293; Genl. Sts. Mass. c. 101, § 39; *Lawrence v. Kitteridge*, 21 Conn. 577; *Cassilly v. Meyer*, 4 Md. 1; *Gilchrist v. Cannon*, 1 Coldw. (Tenn.) 581. But until such order the ancillary administrator is not in default for neglecting to pay over the assets in his hands. *Mackey v. Coxe*, 18 How. (U. S.) 100. But see *Jennison v. Hapgood*, 10 Pick. 77, 100; *Carmichael v. Ray*, 5 Ired. Eq. 365. The tribunal, in which the ancillary administration is pending, is not, however, bound in all cases to order the *residuum* of the estate to be transmitted to the country of the original administration. There

By the statute 5 Geo. 2, c. 7, s. 4, it is enacted, that "the

may be cases in which that tribunal, acting on the circumstances, may deem it proper in the exercise of a sound judicial discretion to ascertain the law of the domicil of the deceased for itself and to apply it in the distribution of the estate of the deceased within its jurisdiction, under its own order and direction. See *Williams v. Williams*, 5 Md. 467; *Porter v. Heydock*, 6 Vt. 374; *Churchill v. Boyden*, 17 Vt. 319; *Parker C. J. in Dawes v. Head*, 3 Pick. 128, 144; *Stevens v. Gaylord*, 11 Mass. 256, 264; *Guier v. O'Daniel*, 1 Binney, 349, note; *Desesbats v. Berquier*, 1 Binney, 336; *Harvey v. Richards*, 1 Mason, 381, 430; *Slatter v. Carroll*, 2 Sandf. 573; *Goodall v. Marshall*, 11 N. H. 93; Genl. Sts. Mass. c. 101, § 39. But see *Jennison v. Hapgood*, 10 Pick. 77, 100; *Dawes v. Boylston*, 9 Mass. 337, 358; *Adlum's Estate*, 6 Phil. (Pa.) 347; *Probate Court v. Kimball*, 42 Vt. 320. In *Harvey v. Richards*, 1 Mason, 381, which was the case of a bill in equity in the circuit court of the United States, sitting in Massachusetts, it was maintained by Judge Story, with great fulness of learning, illustration, and argument, that a court of equity has jurisdiction to decree an account and distribution, according to the *lex domicilii*, of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here. But whether it will proceed to decree such account and distribution, or direct such assets to be remitted, to be distributed by a foreign tribunal, depends upon the circumstances of the case. And that although the property was to be distributed according to the *lex domicilii*, national comity did not require it to be distributed abroad. See, as to the jurisdiction in equity, *M'Namara v. Deyer*, 7 Paige, 239; *Tunstall v. Pollard*, 11 Leigh, 1; *Colbert v. Daniel*, 32 Ala. 314; *Montalvan v. Clover*, 32 Barb. 190. If an executor in Massachusetts, having taken out ancillary administration in another state, after paying the expenses of administra-

tion, and discharging his liabilities there, has a surplus arising from the proceeds of sales of lands in such state, he is to account for it in Massachusetts as personal property. *Jennison v. Hapgood*, 10 Pick. 77. The final and full settlement of the estate is to be made in the place of the domicil of the testator or intestate, for the whole of the personal property and effects which have come to the hands of the executor or administrator, wherever found, or by whatever means collected. *Wells J. in Clark v. Blackington*, 110 Mass. 372, 376; *Jennison v. Hapgood*, 10 Pick. 77. And the distribution of the estate among the heirs or legatees is to be made according to the law of the domicil of the testator or intestate at the time of his decease. *Goodall v. Marshall*, 11 N. H. 88; *Ordronaux v. Helie*, 3 Sandf. Ch. 512; *Churchill v. Prescott*, 3 Bradf. 233; *Jones v. Gerock*, 6 Jones Eq. (N. Car.) 190; *Tucker v. Candy*, 10 Rich. Eq. (S. Car.) 12. The course pursued in *Williams v. Williams*, 5 Md. 467, is instructive in matter of practice on both points, viz, that of transmitting assets for distribution from place of ancillary administration to place of principal administration under letters testamentary, and that of retaining assets for distribution at the place of ancillary administration. *Martha Weld*, the testatrix, had her domicil in Massachusetts, but the bulk of her personal property was in Maryland. The residue of her estate was given to twenty-four legatees, twenty of whom resided in Maryland and the other four in Massachusetts. Her will was proved and letters testamentary granted in Massachusetts and ancillary administration was granted in Maryland. When the ancillary administrator was about to pass his final account in the orphan's court in Maryland, the Massachusetts executor applied to that court for a transfer to Massachusetts of so much of the assets in Maryland as would be sufficient to pay off the four legatees and the expenses of administration in Massa-

houses, lands, negroes, (*n*) and other hereditaments and real estates, situate or being within any of the said plantations [British plantations in America] belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands of what nature or kind soever, owing by any such person to his majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable * to the satisfaction of any debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process in any court of law or equity, in any of the said plantations respectively for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estates towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts.”

§ Geo. 2,
c. 7.
Land,
houses, ne-
groes, &c.
in the plan-
tations :

In the case of *Thomson v. Grant*, (*o*) Alexander Donaldson devised plantations in Jamaica to several trustees, whom also he appointed his executors. Of these, Thomson alone proved the will in the prerogative court of Canterbury; and Grant, Campbell, Meekin, and Green proved it in Jamaica. Thomson died, and Grant, who was one of his executors, proved his will here in the prerogative court. Both Thomson and Grant were creditors

Massachusetts, and it was decided that the application should be allowed. There was no request that the whole residue should be sent to the place of domicile for distribution; but the balance, after transmitting the shares of the four legatees and the expenses of administration in Massachusetts, seems to have been retained in Maryland for distribution among the remaining legatees in the place of ancillary administration. The court held that the sum to be allowed for expenses of administration in Massachusetts was to be settled in Massachusetts. The court, in the above case, said (pp. 470, 471): “As due respect for a court of our sister state requires us to believe the rights of all parties will be properly guarded by that tribunal, there can be no reason for refusing to remit to their jurisdiction such a portion of the

assets as will be sufficient to meet any contingency which may result from the decision of that court.” See *Jennison v. Hapgood*, 10 Pick. 77; *Hubbard v. Hinkley*, 1 Root, 413. Where an executor in Massachusetts takes out an ancillary administration in another state, the question as to charging himself with interest is exclusively cognizable in the courts of the former state, where the final settlement of the estate is to be made. *Jennison v. Hapgood*, 10 Pick. 67; *Clark v. Blackington*, 110 Mass. 369, 372.]

(*n*) Repealed as to negroes by stat. 37 Geo. 3, c. 119. The compensation fund for slaves in Jamaica was held to be legal assets in *Lyon v. Colville*, 1 Coll. 449.

(*o*) 1 Russ. 540, note to *Player v. Foxhall*.

of Donaldson to a large amount. In a suit which was instituted by Thomson on behalf of himself and other creditors, for the administration of Donaldson's estate, and which was afterwards revived by Grant, the devise of the plantations had been declared fraudulent, as against creditors, and Grant had been appointed consignee. Grant then claimed to be entitled to retain, in priority to the other creditors, out of the balances in his hands as consignee, both the debt due from Donaldson to him individually, and also the debt due to him as the executor of Thomson. And Sir Thomas Plumer M. R. held that Grant was entitled as executor to retain both debts out of the balances in question. His honor said that the executor's right of retainer over personal property was clear; and by the act of Geo. 2, plantations in Jamaica are converted, with respect to the payment of debts, into personal assets, and, as such, are possessed by the executor. Grant, therefore, was in a situation in which he could not sue either for the debt due to himself personally, or for that which he, * as the executor of Thomson, had the sole legal right to demand. His coming over to this country, and acting as consignee, could not take away from him a right which attached on the property in his hands. That property was personal assets, and in all respects to be administered as such. In the character of consignee, he retained only the charges incident to that situation. As an executor he was entitled to retain both debts. (*p*)

It seems that, even before this statute, it was held that a foreign plantation, though an inheritance, yet being in a foreign country, was to be looked upon as a chattel to pay debts, and a testamentary thing. (*q*)

It was held, however, in *Charlton v. Wright*, (*r*) that notwithstanding West India estates are made legal assets by this statute, they may be devised so as to make them equitable assets. But this was afterwards overruled in the privy council, in *Turner v. Cox*. (*s*)

By statute 9 Geo. 4, c. 33, after reciting that doubts have arisen
 9 Geo. 4, whether and to what extent the real estates of British
 c. 33. subjects and others (not being Mohammedans or Gen-

(*p*) See, also, *Manning v. Spooner*, 3 Ves. 118.

(*r*) 12 Sim. 274. See, also, *Lyon v. Colville*, 1 Coll. 449, 472.

(*q*) *Noell v. Robinson*, 2 Ventr. 358.
 See, also, *Blankard v. Galdy*, 4 Mod. 226.

(*s*) 8 Moore P. C. 288.

toos), situate within the jurisdiction of her majesty's supreme courts of judicature in India, are liable, as assets in the hands of executors and administrators, to the payment of the debts of their deceased owners, it is declared and enacted, "That whenever any British subject shall die seised of or entitled to any real estate in houses, lands, or hereditaments, situate within or being under the general civil jurisdiction of his majesty's supreme courts of judicature at Fort William, in Bengal, Fort St. George, and Bombay respectively, or whenever any person (not being a Mohammedan or Gentoo) shall die seised of or entitled to any such real estate, situate within the local limits of the civil jurisdiction of the same courts respectively, such real estate of such British subject *or other person as aforesaid (not being a Mohammedan or Gentoo) is and shall be deemed assets in the hands of his or her executor and administrator, for the payment of his or her debts, whether by specialty or simple contract, in the ordinary course of administration." (t)

Whenever any British subjects or persons not being Mohammedans or Gentoos, shall die, entitled to any real estate in India, such estate shall be deemed assets:

Section 2 declares and enacts that the executor, &c. may sell such real estate for the payment of the debts, and make a good title to a purchaser.

executors may sell such real estates for the payment of debts:

By section 3, "In any suit or action to be commenced and prosecuted in any of the said courts respectively, against such executor or administrator as aforesaid, for the recovery of any debt or demand due and owing by such testator or intestate in his lifetime, and at the time of his death, such executor or administrator shall and may be charged with the full amount in value of such real estate as aforesaid, not exceeding the actual net proceeds of such estate when sold by the sheriff, as assets in the hands of such executor or administrator to be administered."

in any action for debt, the executor may be charged with the full amount of such real estate.

The general rule has long been established, that an executor or administrator shall not be charged with any other goods as assets than those *which come to his hands.* (u) But

What assets shall be consid-

(t) Real estate in India being made by this statute personal assets, it is unnecessary to make the heir a party to an administration suit. *Story v. Fry*, 1 Y. & Coll. C. C. 603.

administrator may be charged with the value of personal property belonging to the estate of his intestate, and lost through his negligence, although it never came into his possession. *Tuttle v. Robinson*, 33 N.

(u) *Read's case*, 5 Co. 33 b, 34 a. [An H. 104; *Deberry v. Ire*y, 2 Jones Eq. 370.]

ered as
come to
hand so as
to charge
the execu-
tor:

considerable difficulty exists in ascertaining what is to be esteemed such a coming to the hands of the executor or administrator. It is said in Wentworth's Office of an Executor, (x) that if the testator at the time of his death has a stock of sheep in Cumberland, bullocks in Wales, fat oxen in Bucks, money, household stuff, and plate in London, and his executor dwells at Coventry, viz, far from all these places, the executor has such an actual possession presently upon the testator's death, that he may maintain trespass against any stranger taking them away or spoiling them; * and, therefore, that author considers it doubtful whether this shall not be such a possession in the executor, and such a coming of these goods to his hands, as to charge him with payment of debts and legacies, and make his own goods liable instead of them. However, it was laid down by Lord Holt, in *Jenkins v. Plombe*, (y) that if an executor live at London, and the goods of which the testator died possessed are at Bristol, although the executor has such an immediate possession of them that he may maintain trover in his own name against any converter of them, and the damages recovered shall be assets in his hands, yet if he do not recover so much in damages as really the goods were worth, and that happens not through any fault of his, he shall answer for no more than he recovers. (z)

Again, upon the supposition that goods come fully into the possession and hands of an executor or administrator, but are afterwards wrongfully taken from him, a question arises whether such goods shall be considered assets in his hands. There are some authorities for asserting that things taken out of the possession of the executor are assets in his hands, (a) unless they were taken by the queen's enemies. (b) But it should seem, at least in a court of equity, that an executor or administrator stands in the condition of a gratuitous bailee; with respect to whom the law is, that he is not to be charged, without some default in him. (c) Therefore, if any goods of the testator are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor,

(x) P. 227, 14th ed.

(b) Wentw. Off. Ex. 234, 14th ed.

(y) 6 Mod. 181.

(c) Wentw. Off. Ex. 235, 14th ed.; Com.

(z) See, also, Com. Dig. Assets, D.; Dig. Assets, D. But see *Wightwick v. Tuttle v. Robinson*, 33 N. H. 104.]

Lord, 6 H. L. Cas. 234, per Lord Wens-

(a) *Read's case*, 5 Co. 34 a; *Bethel v. Stanhope*, Owen, 132.

leydale; [post, 1806, 1807.]

the latter shall not, in equity, be charged with these as assets. (*d*)

* Again, if a trespasser takes goods out of the possession of an executor or administrator, although he is bound to sue the trespasser, if known, yet the executor or administrator shall not be answerable in assets for more than he recovers in the suit. But if he omits to sell the goods at a good price, and afterwards they are taken from him, then the value of the goods shall be assets in his hands, and not what he recovers; for there was a default in him. (*e*) Again, if the goods be perishable goods, and before any default in the executor to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself. (*f*) So, if the testator's sheep or other beasts die, or if his ships perish by tempest, the executor shall not be charged with them as assets. (*g*)

With respect to that part of the estate of an executor or administrator which consists of *choses in action*, the law has long been settled, that although debts of every description due to the testator are assets, yet the executor or administrator is not to be charged with them till he has received the money. (*h*) So if the executor or administrator recovers at law or in equity any damages or compensation for any injury done to the personal estate of the testator before or since his decease, or for the breach of any covenant or contract made with the testator, (*i*) or with himself in his representative character, (*k*) all such damages thus recovered shall be assets in his hands, the costs and charges of recovering them being deducted; (*l*) but he shall not be charged

(*d*) Jones v. Lewis, 2 Ves. sen. 240; Wentw. Off. Ex. 236, 14th ed.; Com. Dig. Assets, D.; [Stevens v. Gage, 55 N. H. 175; 2 Central Law Jour. 589.] But a contrary rule is said to prevail at law. See Crosse v. Smith, 7 East, 258, 259; *infra*, pt. IV. bk. II. ch. II. § II.

(*e*) 6 Mod. 181, 182; Wightwick v. Lord, 6 H. L. Cas. 234, 235, per Lord Wensleydale.

(*f*) 6 Mod. 181.

(*g*) Wentw. Off. Ex. 236, 14th ed.; Com. Dig. Assets, D. But see 7 East, 258, 259; *infra*, pt. IV. bk. II. ch. II. § II.

(*h*) Com. Dig. Assets, D.; Bac. Abr. Exors. H. 2; [*ante*, 1663, note (*g*¹); Rug-

gles v. Sherman, 14 John. 446; Smith v. Hurd, 8 Sm. & M. 682. See, also, Jones v. Williams, 2 Call, 102; Douthitt v. Douthitt, 1 Ala. 594.]

(*i*) Co. Lit. 144 a; 1 Roll. Abr. 920; Exors. G. pl. 4, 5; Godolph. pt. 2, c. 24, s. 1, 2; Bac. Abr. Exors. H. 2; Com. Dig. Assets, C.; [Hamilton v. Wilson, 4 John. 72.]

(*k*) See *ante*, 878 *et seq.*; [Sasscer v. Walker, 5 Gill & J. 102.]

(*l*) Wentw. Off. Ex. 191, 14th ed. If the testator recover a judgment for debt and costs, and his executor sue out a *sci. fa.* upon that judgment, the debt and costs due to the testator are assets when

with them until he * has reduced them into possession. (*m*) Thus, in *Williams v. Innes*, (*n*) in order to prove assets in the hands of the defendants, who were executors, an account rendered by them was given in evidence, in which they stated that 1,000*l.* had been awarded as due to the testator's estate from a person who had been jointly concerned with him in underwriting policies of insurance. But Lord Ellenborough held that this was not sufficient proof of assets, as it did not show that any part of the sum awarded had been received by the executors.

But such debts or damages will be regarded as assets, although never, in point of fact, received, if they be released by the executor. For the release, in contemplation of law, shall amount to a receipt. (*o*) So if the executor take an obligation in his own name for a debt due to the testator, he shall be equally chargeable as if he had received the money; for the new security has extinguished the old right, and is a *quasi* payment. (*p*)

And it has been laid down, that where an executor sues for money had and received to his use as executor, the debt or damages is assets immediately; for if the money was had and received by the defendant, by the consent or appointment of the executor, it was assets in his hands forthwith; and if without his consent, yet the bringing the action is such a consent, that, upon judgment obtained, it shall be assets immediately, without execution. (*q*)

* This subject will be further discussed hereafter, when the nature of a *devastavit* by an executor or administrator is considered. (*r*)

received; but the sum due for costs to the executor is only by way of indemnity to himself, and is not assets. Per Parke B. in *Smedley v. Philpot*, 3 M. & W. 586.

(*m*) *Godolph.* pt. 2, c. 24, s. 5; *Jenkins v. Plume*, 1 Salk. 207; 11 Vin. Abr. 239, 240. See, also, *Lowe v. Peskett*, 16 C. B. 500.

(*n*) 1 Campb. 364.

(*o*) *Cocke v. Jenner*, Hob. 66; *Brightman v. Keighley*, Cro. Eliz. 43.

(*p*) *Norden v. Levit*, 2 Lev. 189; *Hosier v. Arundell*, 3 Bos. & Pull. 7; *Partridge v. Court*, 5 Price, 419, 420, 421; *Sparkes v. Restal*, 22 Beav. 587; [*Biscoe v. Moore*, 12 Ark. 77. See *Bass v. Chambliss*, 9 La. Ann. 376; *post*, 1799. An administrator, who is himself indebted to a debtor of the

estate of the deceased, may, if he chooses, accept a discharge of his own debt toward the payment of the debt due to him as administrator. By so doing he makes himself answerable to the estate for the whole debt which he thus settles and discharges. *Alvord v. Marsh*, 12 Allen, 603, 605, 606.]

(*q*) *Jenkins v. Plume*, 1 Salk. 207; S. C. 6 Mod. 181. [Where a distributee is indebted to the estate, and in the distribution thereof there is a surplus of debt over his distributive share, it is the duty of the administrator to collect it and account for it as assets. *Springer's Appeal*, 29 Penn. St. 208. See, also, *Hallowell's Estate*, 23 Penn. St. 223.]

(*r*) *Infra*, pt. IV. bk. II. ch. II. § II.

There may be personal property of the testator or intestate, to which his personal representative, as such, is entitled, ^{Next avoidance of a church.} which is not assets in his hands, by reason of not being vendible. For example, the patron of a church grants to the testator the next avoidance, and the church becomes void; and the testator dies before he presents. After his death his executor presents, and has the benefit of preferring his son or his friend. Yet this shall make no assets in his hands; because he could not lawfully take money to present. (s) But if a stranger presents, and gets his clerk admitted, and the executor recovers damages in a *quare impedit*, the money so recovered will be assets. (t) And if the testator had died before the church had become void, then, because the executor might lawfully have sold it, it should seem that he will be charged with the value as assets, if he has neglected a proper opportunity to make a sale. (u)

A grant for years of an office is assets in the hands of the executor or administrator of the grantee. (x) ^{Office for years.}

There has been occasion to state, in an earlier stage of this work, (y) that the statute of frauds (29 Car. 2, c. 3, * s. 12), after enacting that estates *pur autre vie* shall be ^{Estates pur autre vie.} devisable by a will in writing, signed by the devisor or by some other person in his presence and by his express directions, and attested and subscribed in the presence of the devisor by three or more witnesses, (z) proceeds to enact, that if no such devise thereof is made, the same shall be chargeable in the hands of the heir, if it shall come to him by special occupancy, as assets by descent; and in case there shall be no special occupant, it shall go to the

(s) Wentw. Off. Ex. 173, 14th ed.; Godolph. pt. 2, c. 24, s. 8. See, also, Lord Tenterden's judgment in *Rennell v. Bishop of Lincoln*, 7 B. & C. 195.

(t) Wentw. Off. Ex. 173, 14th ed.; Godolph. pt. 2, c. 24, s. 8; *Sale v. Bishop of Lichfield*, Owen, 99; *Smallwood v. Bishop of Lichfield*, 1 Leon. 205.

(u) Wentw. Off. Ex. 173, 14th ed. So an archbishop's options (see *ante*, 673) are assets in the hands of his executor. The archdeaconry of Rochester was named by Archbishop Herring as his option, and

sold, dignity included, by his executors at Garraway's Coffee-house.

(x) Sir George Reynel's case, 9 Co. 97 a; *Schellinger v. Blackerby*, 1 Ves. sen. 347.

(y) *Ante*, 682.

(z) Lands held under leases for lives will pass by a devise under the words "lands and hereditaments." *Fitzroy v. Howard*, 3 Russ. 223. See, also, *Weigall v. Brome*, 6 Sim. 99; and the statute 1 Vict. c. 26, s. 26, preface.

executors or administrators of the grantee, and shall be assets in their hands. It must be remarked that this statute does not declare to whom the residue or surplus, which shall remain in the hands of the executors or administrators, shall belong, in case the estate goes to them under the statute. And in the case of *Oldham v. Pickering*, (a) it was determined, that such residue was *not* distributable amongst the next of kin ; for, notwithstanding the alteration by the statute, the estate remained freehold. This gave occasion to the passing of the stat. 14 Geo. 2, c. 20, s. 9, which, after reciting the statute of Car. 2, and that doubts had arisen, where no devise was made of such estates, to whom the surplus of such estates, after the debts of such deceased owners thereof are fully satisfied, shall belong, enacts, “ that such estates *pur autre vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said act for prevention of frauds and perjuries, or so much thereof as shall not have been so devised, shall go, be applied and distributed, in the same manner as the personal estate of the testator or intestate.”

Neither of these statutes, however, provides expressly for the case of a tenant *pur autre vie* dying intestate as to that estate, but having made a valid will of his personalty ; or in * other words, the statutes omit to state whether the surplus shall in such case go according to the personal estate disposed of by the will, or as undisposed of personal estate. (b) Nor is any provision made by these statutes for the surplus which may be in the hands of an executor or administrator as special occupant. Both these points were fully considered by Lord Eldon in the case of *Ripley v. Waterworth*. (c) There lands had been limited to a man, his executors, administrators, and assigns, *pur autre vie*. He died, having published his will (not attested according to the statute of frauds,) and appointed an executor, and made a residuary bequest of his personal estate. There were four distinct claimants, the heir-at-law, the residuary legatee, and the next of kin ; and a claim was made by the executor for his own benefit. For the heir-at-law it was urged, that it was real estate, viz, a descendible freehold ; that it would not pass by an unattested will, and an executor could not at common law take as special occupant ; and,

(a) 2 Salk. 464 ; S. C. Carth. 376.

(c) 7 Ves. 425.

(b) See Watkins on Conveyancing, 71,
note by Morley and Coota.

therefore, the heir-at-law was entitled. For the residuary legatees and next of kin it was urged, that an executor might at common law take an estate *pur autre vie*, as special occupant; and that even prior to the statute of frauds it was assets in his hands; and that it would be strange if (the statute providing that where there is no special occupant it shall go to the executor) it should not go to the executor where it is expressly given to him; and that the executor would, as special occupant, take it as personal estate, chargeable with debts, and subject to application as personal estate after debts paid. The lord chancellor was of opinion that it could in no event go to the heir; that it did not belong to the executor; and that, as between the next of kin and residuary legatee, the executor was in equity a trustee for those to whom the testator had given the personal estate, by a will sufficient to pass personal estate, and therefore * he must be considered as holding it for the residuary legatee. (d)

With respect to estates *pur autre vie* of any deceased person, who shall not have died before the 1st day of January, 1838, the statute 1 Vict. c. 26, after repealing the above mentioned statutes of Car. 2 and Geo. 2, and enacting, by section 3, that the power of every person to devise his estate shall extend to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or incorporeal hereditament, proceeds to enact, by section 6, that “if no ^{1 Vict. c.} disposition by will shall be made of any estate *pur autre* ^{26.} *vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and

(d) Watk. Convey. edition by Morley of Lord Lyndhurst, in *Fitzroy v. Howard*, and Coote, 71, note. See, also, *James v. 3 Russ.* 230. Dean, 11 Ves. 392; and the observations

distributed in the same manner as the personal estate of the testator or intestate." (e)

In the case last cited Lord Eldon observed, with respect to the claim of the executor for his own benefit, that he doubted whether an executor or administrator ever takes anything as such which he will not be bound to apply as * personal estate of the testator or intestate. (f) And in *Miller v. Harewood*, (g) his lordship, recurring to his decision in *Ripley v. Waterworth*, said, "I have determined, and I see no reason to dissent from it, that, where the executor is the special occupant, taking as executor, he must hold that as all other property taken by an executor, and therefore distributable in this court." From this principle it seems to be a necessary deduction, that whenever personal estate is limited to executors or administrators, as purchasers, they will take for the benefit of the persons entitled to the personal estate. There has already been occasion, in a previous part of this treatise, (h) to state, at some length, the authorities which are connected with this question.

The absolute property of the goods must have been vested in the testator, in order to make them assets in the hands of the executor. (i) Therefore, if the testator takes a bond for another in trust, and dies, this is not assets in the hands of his executor. So if the obligee assigns over a bond, and cove-

(e) See, as to the construction of this section, *Reynolds v. Wright*, 2 De G., F. & J. 590; 25 Beav. 100; *ante*, 686, note (u).

(f) 7 Ves. 438.

(g) 18 Ves. 273.

(h) *Ante*, 1139 *et seq.*

(i) *Bac. Abr. Exors. H. 1.* See *Parker v. Baylis*, 2 Bos. & Pull. 78; [*Green v. Collins*, 6 Ired. (Law) 139; *Thompson v. White*, 45 Maine, 445; *Johnson v. Ames*, 11 Pick. 173; *Merrick's Estate*, 8 Watts & S. 402; *Schoolfield v. Rudd*, 9 B. Mon. 291; *Perkins v. Perkins*, 46 N. H. 110; *Trecothick v. Austin*, 4 Mason, 16; *Gray C. J. in National Bank of Troy v. Stanton*, 116 Mass. 439. Stock held by a trustee is not assets in the hands of his ad-

ministrator. *United States v. Cutts*, 1 Sumner, 133. Where property attached in the hands of trustees is assigned by the owner, and the attachment is afterwards dissolved by his death and the grant of letters of administration, the assignee, and not the administrator, is entitled to the property. *Coverdale v. Aldrich*, 19 Pick. 391. But "if the testator has money or other property in his hands belonging to others, whether in trust or otherwise, and it has no ear-mark, and is not distinguishable from the mass of his own property, the party must come in as a general creditor, and it falls within the description of assets of the testator." Story J. in *Trecothick v. Austin*, 4 Mason, 29; *Wilde J. in Johnson v. Ames*, 11 Pick. 181.]

nants not to revoke, and dies, that bond is not assets in hands of the executor of the obligee. (*j*)

It is necessary in this place to advert to the nature of terms attendant on the inheritance. When a term for years is created for a particular purpose, as for raising money for payment of debts, or portions for younger children, and the purpose for which the term was created is satisfied, the termor is considered in equity as a trustee for the owner of the inheritance; and though at law the term is deemed a term in gross in such trustee, yet in equity it follows the fee, *and is looked upon as completely consolidated with it. (*k*) Hence it is not regarded as personal assets in the hands of the executor of the person entitled to the fee, but as real assets which go to his heir. (*l*) Yet this must not be understood of every term which attends the inheritance; for where a termor purchases the freehold and inheritance, and takes a conveyance thereof in the name of a trustee, although the term in himself will be attended on his equitable fee-simple, yet, at his death, it will be assets in the hands of his personal representatives. (*m*)

Terms attendant on the inheritance of testator.

It must be observed, that executors or administrators cannot be in a better condition, with respect to the estate of the deceased, than he himself would have been in; and therefore they cannot employ as general assets, property which he would have been bound to apply to a particular purpose. (*n*) Thus, in *Hassall v. Smithers*, (*o*) a remittance in bills and notes for a specific purpose, viz, to answer accept-

Fund for specific purposes not general assets.

(*j*) *Deering v. Torrington*, 1 Salk. 79. But in *Byrn v. Godfrey*, 4 Ves. 6, it was held that a promissory note given to the testator was assets, notwithstanding his declaration to his executor that he never meant to call for payment of it.

(*k*) See *Watk. Convey.* 48, note by Morley and Coote.

(*l*) *Tiffin v. Tiffin*, 1 Vern. 1; *Thruxton v. Atty. Gen.* 1 Vern. 341.

(*m*) *Dowse v. Percival*, 1 Vern. 134; *Thruxton v. Atty. Gen.* 1 Vern. 341; *Gunter v. Gunter*, 23 Beav. 571. See, also, *Belaney v. Belaney*, L. R. 2 Eq. 210.

But by stat. 8 & 9 Vict. c. 112, after December 31, 1845, all terms attendant on the inheritance shall determine, unless for the purpose of protection, in certain cases, against incumbrances. See *Cottrell v. Hughes*, 15 C. B. 532; *Plant v. Taylor*, 7 H. & N. 211; *Owen v. Owen*, 3 H. & C. 88.

(*n*) See acc. per Lord Ellenborough in *Taylor v. Plumer*, 3 M. & Sel. 578; and per Little Dale J. in *Ashby v. Ashby*, 7 B. & C. 453; [*Fisher v. Fisher*, 1 Bradf. Sur. 336. See *Cronan v. Cotting*, 99 Mass. 334, 336.]

(*o*) 12 Ves. 119.

ances, was received by an administrator, in consequence of the death of the party to whom the remittance was made; and it was held that the special purpose operated as a lien, and that the sum remitted could not be applied by the administrator as general assets.

Other instances may occur, where personal property may be in the hands of the executor, and yet not applicable to any but a special purpose. Thus, in *Parry v. Ashley*, (*p*) *the testator charged his real estate, which consisted of one house only, with an annuity to his widow, and subject to that annuity he devised it to Sarah Ashley in fee, and appointed her his executrix. The testator had insured the house; and on the expiration of the policy a few months after his death, it was renewed by Sarah Ashley. The house was afterwards burnt down. And Sir L. Shadwell V. C. held, that as she, being executrix, renewed the policy, it must be taken that she did so in the character of executrix. (*q*) But his honor was of opinion that the proceeds of the policy could not be considered as part of the testator's personal estate, but that they were affected with a trust for the benefit of the parties interested in the real estate. (*r*) Again, in *Thacker v. Wilson*, (*s*) the court of king's bench held, that under the statute 14 Geo. 3, c. 78 (building act), s. 41, where a party wall has been rebuilt, the person who is owner of and entitled to the improved rent of the adjoining premises, is liable to contribution out of such rent, though he be no otherwise owner than as an executor or administrator; and this, although there be a judgment outstanding, of a date prior to the pulling down of the wall, and no sufficient assets to meet it. For the portion of the rent claimable in respect of such contribution is not assets, inasmuch as this claim is a lien upon so much of the rent.

In *Smedley v. Philpot*, (*t*) the defendant's testatrix, Jane Carter, had commenced a suit in chancery for an account under a will, in which she employed as her solicitors, first one Jones, then

(*p*) 3 Sim. 97.

(*r*) See *Rook v. Warth*, 1 Ves. sen. 461.

(*q*) It may here be mentioned that it has been held that an executor in trust has a sufficient interest to enable him to make an insurance in his own name, on the life of a person who has granted an annuity to the testator. *Tidswell v. Ankerstein*, Peake N. C. P. 151.

See, also, *Cruikshank v. Roberts*, 6 Madd. 104, for another instance of assets in the hands of executors not being regarded as part of the general personal estate.

(*s*) 3 Ad. & El. 142; S. C. 4 Nev. & M. 659.

(*t*) 3 M. & W. 573.

the present plaintiff, who successively gave * up the conduct of the suit, and then one Johnson, who continued to act up to her death in 1829. After her death the present defendant, her executor, filed a bill of revivor, and Johnson continued to conduct the suit for him. In 1833 a decree was made, whereby the rights of the several parties were declared, and it was ordered that the master should settle the costs of all the parties, and that the same, when taxed and settled, should be paid out of the fund in court in the following manner: viz, the plaintiff's (the now defendant's) costs, to Johnson his solicitor, and the costs of the several defendants in the suit to their respective solicitors (naming them). The plaintiff's (now defendant's) costs were taxed, including the costs both of Jane Carter in her lifetime and of him as her executor, and consequently the taxation was founded on the bills of Jones, of the present plaintiff, and of Johnson. Certain sums in respect of them were afterwards paid by the officer of the court of chancery to Johnson. The present plaintiff sued the present defendant, as executor of Jane Carter, for the amount of his bill, and had judgment of assets, *quando acciderint*. He afterwards brought another action on the judgment and gave notice of trial, and it was then agreed between them, that, on his withdrawing the record, the defendant would then pay him 100*l.* on account of his bill, and the remainder *out of the assets which should first come to the defendant's hands* as executor of Jane Carter. A further sum was afterwards paid out of the court of chancery to Johnson in respect of the same costs; and the plaintiff having brought an action on the agreement, the question was, whether this sum was assets which had come to the hands of the defendant within the meaning of the agreement. Parke B. and Alderson B. were of opinion in the affirmative, considering that all the money received by Johnson, over and above what paid the amount of his own bill, was received on account of the executor, and was equivalent to a receipt by *him* in point of law. But Lord Abinger C. B. was of a contrary opinion, and thought that the plaintiff ought to have been nonsuited; *not because the money ought not to have been paid to him, but because it was in effect appropriated by the order, and the circumstances of the case, to him, and did not therefore form any part of Jane Carter's assets.

Where a deed is set aside as fraudulent against any of the creditors of the deceased, the property becomes assets, and sub-

[1678] [1679]

sequent creditors are let in. (u) An assignment within the statute 13 Eliz. c. 5, is utterly void against creditors, and the property assigned is assets in the hands of the executor. (x) It should seem, that to render a conveyance fraudulent.

(u) *Richardson v. Smallwood*, 1 Jac. 552. See *ante*, 756, note (j); [Bump *Fraud. Conv.* 329, and cases cited in note (4); *Norton v. Norton*, 5 Cush. 524; *Ammon's Appeal*, 63 Penn. St. 284; *Trimble v. Turner*, 13 Sm. & M. 348; *Holland v. Cruft*, 20 Pick. 338; *Gilliam v. Spence*, 6 Humph. 160; *McLane v. Johnson*, 43 Vt. 48, 57, and cases cited; *Parkman v. Welch*, 19 Pick. 231; *Clark v. French*, 23 Maine, 221.]

(x) 3 B. & Ad. 362; [Welsh *v. Welsh*, 105 Mass. 229; *Holland v. Cruft*, 20 Pick. 321; *Buckmyer v. Mairs*, Riley, 208; *Marr v. Ricker*, 1 Humph. 348. The maker of a negotiable note, who has been appointed administrator of the estate of the payee, may defend against the suit of an indorsee by showing that the indorsement was invalid as against the creditors of the payee; that the avails of the note are needed to pay debts of the payee, and that he, as administrator, claims the note to apply it for that purpose. *Cross v. Brown*, 51 N. H. 486. "It is the duty of an administrator, as representing the creditors of an estate, to collect all the assets which are applicable to the payment of debts." Gray J. in *Welsh v. Welsh*, 105 Mass. 229. An executor or administrator may maintain an action at law, or a suit in equity, to set aside a conveyance of property made by the deceased for the purpose of defrauding his creditors, although the deceased himself could not do so. *Martin v. Root*, 17 Mass. 222; *Gibbens v. Peeler*, 8 Pick. 254; *McKnight v. Morgan*, 2 Barb. 171; *Morris v. Morris*, 5 Mich. 171; *Judson v. Connolly*, 4 La. Ann. 169; *Brown v. Finley*, 18 Misson. 375; *Holland v. Cruft*, 20 Pick. 321; *Chase v. Redding*, 13 Gray, 418; *Tenney v. Poor*, 14 Gray, 500; *McLane v. Johnson*, 43 Vt. 48. So he may set up fraud and avoid the act of the deceased, for the benefit of the creditors, where the estate is

insolvent. *Bouslough v. Bouslough*, 68 Penn. St. 495; *Cross v. Brown*, 51 N. H. 486. If the administrator of a fraudulent vendor neglects to use the appropriate means to obtain property fraudulently conveyed by his intestate, for the payment of his debts, he will be liable to the creditors of the deceased for such neglect. *Danzey v. Smith*, 4 Texas, 411; *Lee v. Chase*, 58 Maine, 436; *Cross v. Brown*, 51 N. H. 488. He is bound to inventory land which to his knowledge has been fraudulently conveyed by the intestate. *Minor v. Mead*, 3 Conn. 289; *Andrews v. Tucker*, 7 Pick. 250; *Booth v. Patrick*, 8 Conn. 283; *Andruss v. Doolittle*, 11 Conn. 283; *Bourne v. Stevenson*, 58 Maine, 504. But if the administrator has no knowledge that the conveyance was fraudulent, he cannot be made liable for not inventorying the property. *Booth v. Patrick*, 8 Conn. 106. See *Potter v. Titcomb*, 1 Fairf. 53; *Cringan v. Nicholson*, 1 Hen. & Munf. 428. If the property so fraudulently conveyed is recovered by the executor or administrator, it will constitute new assets, within the exception in the special statute of limitations, in Massachusetts, against which the creditors may enforce their claims in manner allowed by law, at any time within two years after the actual receipt of the new assets. *Welsh v. Welsh*, 105 Mass. 229, 231; *Holland v. Cruft*, 20 Pick. 321, 325; *Chenery v. Webster*, 8 Allen, 76; *Aiken v. Morse*, 104 Mass. 277; *post*, 1946, note (u¹). The discharge of a note by the testator or intestate, in fraud of his creditors, leaves the note still good or valid in favor of the executor or administrator, who may recover the entire amount of the note, although it may not all be required for the payment of creditors, and the surplus will go to the legatees or distributees of the deceased. "This is but an incident to the right of the administrator, to recover for

lent within that statute, the party, at the time of making it, must be indebted to the extent of insolvency. (*y*) But in *Shears v. Rogers*, (*z*) where a person, owing 102*l.* on a bond, wrote to the obligee that he and his wife were bowed down by pecuniary embarrassments, and that the obligee's proceeding to extremities would render the debtor's wife after his death perfectly destitute, and a month afterwards, for a nominal sum of ten shillings, and in consideration of natural love and affection, assigned a lease (of the value of 206*l.*) to A., in trust for his own benefit for life, and after his death for that of one of his daughters-in-law, and he soon afterwards died, having by his will made the assignee of the lease his executor; by which assignment of the lease, the residue of his property became insufficient to discharge the bond debt; the court of king's bench held that the assignment was within the meaning of the statute, and utterly void against creditors, and that the lease was assets in the hands of the executor. And Patteson J. remarked, that if the defendant had not been executor, then, by the assignment in question, he would have been executor in his own wrong, (*a*) and chargeable by the creditors in respect of the property taken * by him under that instrument; and that the lease could not be less assets, because the defendant was rightful executor. (*a*¹)

Hitherto the subject has been confined to the consideration of assets, such as may be reached at law, and such as a creditor, suing the executor in an action at law for a ^{Equitable} assets in

the use of the creditors." *Martin v. Root*, 17 Mass. 222, 228; *Holland v. Cruft*, 20 Pick. 338. But it has been held in equity that when an estate fraudulently conveyed is ordered to be sold for the payment of the fraudulent grantor's debts, any surplus remaining after the payment of those debts will be directed to be restored to the fraudulent grantee; on the ground that such conveyance is good between the parties and their representatives, and binds all persons except creditors and subsequent purchasers, precisely as if there were no taint of fraud in it. See *Burtch v. Elliot*, 3 Ind. 100; *Rochelle v. Harrison*, 8 Porter, 352; 2 Sugden V. & P. (8th Am. ed.) 713, note (*h*). In a case where the property fraudulently conveyed is claimed by an executor or administrator, the grantee

or donee is entitled to all over the amount required for the payment of debts and expenses of administration; and it has been held to be for the administrator to show the amount required for that purpose. *McLean v. Weeks*, 61 Maine, 277.]

(*y*) But see *ante*, 754, note (*t*); *Jackson v. Bowley*, Carr. & M. 97. But see, also, 1 Smith's Leading Cas. 17, 4th ed.; [*Spirett v. Willows*, 3 De G., J. & S. (Am. ed.) 293, and notes (1) and (2) and cases cited, 302, and cases in note (1); 2 Sugden V. & P. (8th Am. ed.) 714, note (*t*).]

(*z*) 3 B. & Ad. 362.

(*a*) See *ante*, 259, 260. See, also, *Shee v. French*, 3 Drew. 719, per Kindersley V. C.; [*Backhouse v. Jett*, 1 Brock. 508.]

(*a*¹) [See *Newcomb v. Wing*, 3 Pick. 168.]

the hands of an executor. debt, due from the testator, might bring forward in evidence on an issue joined on the executor's plea of *plene administravit*. But there are, besides, various interests frequently forming part of the estate of an executor or administrator, which are not recognized as assets at law; and which, therefore, if administered at all, must be administered in equity. This latter portion of the estate in the hands of an executor or administrator is called *equitable assets*, in contradistinction to the former, which is called legal assets. In other words, legal assets are such as are liable to debts in the temporal courts, and were formerly liable to legacies in the spiritual, by the course of law. Equitable assets are such as are liable only by the help of a court of equity. (*a*²)

A most important distinction exists, with respect to the administration of these two kinds of assets. If they are legal, they must be administered by the executor or administrator of the deceased in a due course of administration, having regard to those rules of priority among creditors which have already been investigated in this treatise. (*a*³) But if the assets in the hands of an executor are equitable, then, although the precedence in payment of debts to legacies must be respected, yet, as among creditors, the assets must be applied in satisfaction of all the claimants, *pari passu*, without any regard to the priority in rank of one debt to another. The principle of this distinction is, that in natural justice and conscience, and in the contemplation of a court of equity, all debts are equal, and the debtor is equally bound to satisfy them all, whether by specialty or by simple contract. (*b*) Therefore, since a claimant upon equitable assets is under the necessity of going to a court of *equity in order to reach them, that court will act only according to the rule of doing justice to all creditors, without any distinction as to priority. (*c*)

It must be observed that the true test, as to whether the assets are legal or equitable, is not whether the executor or administrator, but whether the *claimant* can reach them without resorting to a court of equity. It is, therefore, difficult to understand why

(*a*²) [There is no distinction between legal and equitable assets in Pennsylvania. *Estate of Sperry*, 1 Ashm. 347.]

(*a*³) [*Ante*, 988 *et seq.*]

(*b*) See stat. 32 & 33 Vict. c. 46, *ante*, 1010.

(*c*) *Plunket v. Penson*, 2 Atk. 294. It

seems, however, that in the administration of the separate estate of a married woman after her decease, the debts are to be paid in order of priority and not *pari passu*. *Shattock v. Shattock*, L. R. 2 Eq. 182, 194.

the equity of redemption of a term for years should have been held to be equitable and not legal assets in the hands of an executor or administrator; for although the mortgage is forfeited at law, and the whole estate thereby vested in the mortgagee, and the right of redemption is merely equitable property at the time of the death of the testator or intestate, yet it is a right which comes to the executor or administrator as part of the personal estate, and for which it can hardly be doubted he would at this day be chargeable on an issue of *plene administravit*. However, Sir Joseph Jekyll delivered his opinion, after great deliberation, in the case of *The Creditors of Sir Charles Cox*, (*d*) that it was only equitable assets. And Lord Hardwicke held accordingly, in the case of *Hartwell v. Chitters*. (*e*)

It must, however, be observed, that in *Sharpe v. Scarborough*, (*f*) it was stated by Mitford, solicitor general, in argument, that the case of *Sir Charles Cox's Creditors* and *Hartwell v. Chitters* have been considered as overruled. And Mr. Cox, in a note to his edition of *Peere Williams*, doubts the authority of those decisions, (*g*) and *cites several cases (*h*) to show that it has been decided that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets *at law* in the hands of the executor, for so much as they are worth beyond the sum paid for their redemption, though recoverable only *in equity*. (*i*) But Mr. Justice Bayley, in his judgment in *Clay v. Willis*, (*k*) cites *The Creditors of Sir Charles Cox*, and *Hartwell v. Chitters*, as establishing that the equity of redemption of a term is equitable assets. (*k*¹)

(*d*) 3 P. Wms. 342. It is said in the note by Mr. Cox, 3 P. Wms. 344, that it appears from the Reg. Lib. that the point was not in fact determined; but it seems unquestionable that the master of the rolls delivered a solemn opinion that the equity of redemption was equitable assets.

(*e*) Ambl. 308.

(*f*) 4 Ves. 541.

(*g*) 3 P. Wms. 344.

(*h*) *Hawkins v. Lawse*, 1 Leon. 155; *Alexander v. Lady Gresham*, 1 Leon. 225; *Harcourt v. Wrenham*, or *Harwood v. Wraynam*, Moore, 858; 1 Roll. Rep. 56; 1 Brownl. 76; 1 Roll. Abr. 920, G. pl. 6.

(*i*) But the author of *Wentworth's Of-*

fice of an Executor says, that where the redemption by the executor is after the day of payment, *equity only and not law* can make any part of the value assets in his hand. P. 186, 14th ed. See *ante*, 1661.

(*k*) 1 B. & C. 372. This part of Mr. Justice Bayley's judgment is also cited and relied upon by Lord Tenterden C. J. in *Barker v. May*, 9 B. & C. 493.

(*k*¹) [In the American States an equity of redemption, either in real or personal estate, is undoubtedly legal assets, and is to be treated as such in the administration of the estates of persons deceased. *Sharp v. Earl of Scarborough*, 4 Ves. (Sumner's ed.) 538, note (*a*); *Roosevelt v. Fulton*, 7

It appears, notwithstanding, to be the better opinion at this day, that equities of redemption are not necessarily equitable assets. (*l*) And in the view of an eminent writer, (*m*) the more accurate statement of the doctrine is, that legal assets are such as come into the hands and power of an executor or administrator, or such as he is intrusted with by law, *virtute officii*, to dispose of in the course of administration; or in other words, whatever an executor or administrator takes, *qua* executor or administrator, or in respect to his office, is to be considered as legal assets. So, in the late case of *Cook v. Gregson*, (*n*) Kindersley V. C. (applying the test whether the executor or administrator would take simply *virtute officii*), held that an equity of redemption on a mortgage of a *sum of money charged on a real estate, was legal assets. And his honor said that he thought the cases above cited as to mortgages for terms for years could not be supported. In the still later case of *Shee v. French*, (*o*) the same learned judge laid down that the question whether assets are legal or equitable depends on this, whether, if the case were before a court of law, on an issue of *plene administravit*, that court would treat the property as assets, and the principle on which a court of law proceeds is to inquire whether the property came to the hands of the executor *virtute officii*. If it did, the court of law regards it as assets, applicable to the payment of the testator's debts; and then a court of equity treats it as legal assets. (*p*)

Accordingly, in *Wilson v. Fielding*, (*q*) it was adjudged by

Cowen, 71; 4 Kent, 162. The rule has generally prevailed, that an equity of redemption may be taken and sold on execution at law. See 4 Kent, 161; *Ingersol v. Sawyer*, 2 Pick. 276; *Ford v. Philpot*, 5 Harr. & J. 312; *Van Ness v. Hyatt*, 13 Peters, 294; *Waters v. Stewart*, 1 Caines Cas. 47; *Hobart v. Frisbie*, 5 Conn. 592; *Collins v. Gibson*, 5 Vt. 243; *M'Worter v. Huling*, 3 Dana, 349; *Garro v. Thompson*, 7 Watts, 416; *Hunter v. Hunter*, 1 Walker (Miss.), 194. See *ante*, 650, note (*d*¹).]

(*l*) See 2 Jarman on Wills, 585, 586, 8d ed.; Story on Equity, ch. ix. s. 551, note (1). The equity of redemption of a mortgage in fee is made legal assets by the proviso (*post*, 1692) in the stat. 3 & 4

W. 4, c. 104; *Foster v. Handley*, 1 Sim. N. S. 200; *In re Barrell*, L. R. 9 Eq. Cas. 443.

(*m*) Story on Equity, ch. ix. s. 551.

(*n*) 20 Jur. 510; 3 Drew. 547.

(*o*) 3 Drew. 716.

(*p*) See accord. *Atty. Gen. v. Brunning*, 8 H. L. Cas. 243, 256, 264, 265; *Christy v. Courtenay*, 26 Beav. 140; *Mutlow v. Mutlow*, 4 De G. & J. 539.

(*q*) 2 Vern. 763. It should seem by the report of this case in 10 Mod. 427, that Lord Macclesfield, at this period, altogether denied the doctrine of administering equitable assets *pari passu*. The case was cited before Lord Hardwicke in *Hartwell v. Chitters*, *ubi supra*.

Lord Macclesfield, that personal assets, as a lease for years, a bond, or the grant of an annuity, in a trustee's name, should be applied as legal assets in a due course of administration, although a creditor could not come at them without the aid of a court of equity. And the same law was laid down by Sir Joseph Jekyll, in the case of *Sir Charles Cox's Creditors*. (r)

With respect to that portion of the property in the hands of an executor or administrator, which consists of the proceeds of the sale of real estate, it is now fully settled, that such proceeds are *equitable* and not legal assets. In some of the older cases, indeed, it has been holden, that where land is devised to executors for the payment of debts and legacies, or is devised to be sold by executors, or devised to executors to be sold for that purpose, the proceeds arising from the sale are legal *assets. (s) But later cases have completely established, that in all cases they constitute merely equitable assets. (t) In *Clay v. Willis*, (u) A. mortgaged lands in fee to B. & Co., with a power of sale upon trust, to repay themselves the moneys advanced, &c. and to pay over the surplus to A., his executors and administrators. Before any sale was made, A. died, having devised all his real and personal property to C. and D. (whom he also made executors) upon trust, to sell and pay debts, &c. During the lifetime of C. and D., B. & Co. sold the estate, and paid the surplus into the hands of E., who was agent for C. and D. Whilst the money remained in E.'s hands, C. and D. died; E. also soon died after, leaving the defendant his executor. The plaintiff having taken out administration *de bonis non*, with the will of A. annexed, brought an action for money had and received against the defendant. And it was held by the court of king's bench that it could not be maintained; for that the money in the defendant's hands was equitable, and not legal assets, and therefore would not have been recoverable by C.

(r) 3 P. Wms. 342.

(s) *Girling v. Lee*, 1 Vern. 63; *Cutterback v. Smith*, Prec. Chanc. 127; *Bickham v. Freeman*, Prec. Chanc. 136; *Anon.* 2 Vern. 133; *Greaves v. Powell*, 2 Vern. 248; *Anon.* 2 Vern. 405; *Burwell v. Corrant*, Hardr. 405.

(t) *Lewin v. Okeley*, 2 Atk. 50; *Silk v. Prime*, 1 Bro. C. C. 138, *in notis*; *Barton v. Boucher*, 1 Bro. C. C. 140, *in notis*; *Newton v. Bennet*, 1 Bro. C. C. 134; *Bat-*

son v. Lindegreen, 2 Bro. C. C. 94; *Baily v. Ekins*, 7 Ves. 319; *Shiphard v. Lutwidge*, 8 Ves. 26; *Clay v. Willis*, 1 B. & C. 364; *Barker v. May*, 9 B. & C. 489; *S. C.* 4 Mann. & R. 336. The case of *Lovegrove v. Cooper*, 2 Sm. & G. 271, seems to conflict with these authorities. But *quære* whether it is correctly reported. See, also, *Bain v. Sadler*, L. R. 12 Eq. Cas. 570.

(u) 1 B. & C. 364.

and D. in their representative character. In *Barker v. May*, (v) the testator devised to his executors, their heirs and assigns, his lands upon trust to sell the same; and directed that the money arising from the sale should be deemed part of his personal estate, and that it should be subject to the disposition made concerning his personal estate. He then *directed his personal estate to be sold; and when the money arising from the sale of his personal and real estate should be collected, he disposed of it in the manner mentioned in the will, and among other dispositions he bequeathed a legacy to A. B. The court of king's bench held that the money arising from the sale of the real estate was equitable assets. And a prohibition was granted to the consistorial court at Norwich, in which the legatee had sued for his legacy, and the executor, having accounted for all the personal estate, admitted that he had in his hands a sum of money arising from the sale of the real estate. And Lord Tenterden observed, that it was quite clear that the testator could not alter the legal character of the property, by directing that it should be considered as part of his personal estate. (w)

Where the assets are partly legal, and partly equitable, though equity cannot take away the legal preference on legal assets, yet if one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the court will postpone him until there is an equality in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets. (x)

Where a man has a general power of appointment over a fund, and he actually exercises his power, whether by deed or will, the property appointed shall form part of his assets, *so as to be subject to the demands of his creditors

(v) 9 B. & C. 489; S. C. 4 Mann. & R. 386.

(w) But it is a mistake to treat the price of an estate contracted by the testator to be sold and afterwards received by the executor as proceeds of the real estate in the hands of an executor in the sense that makes the proceeds of real estate equitable assets. *Atty. Gen. v. Brunning*, 8 H. L. Cas. 243, reversing the decision of the exchequer, 4 H. & N. 94. Where a

testator devised a freehold house to A., whom he appointed one of his executors, charged with a sum of money payable within twelve months, this was held equitable assets in the hands of the executors. *Lowe v. Peskett*, 16 C. B. 500; *ante*, 1317, note (d).

(x) *Morrice v. Bank of England*, Cas. temp. Talb. 220, by Lord Talbot; *Chapman v. Esgar*, 1 Sm. & G. 575.

at his death, in preference to the claims of his legatees or appointees. (y) But in order to raise this equity, the power must be actually executed; (z) for equity never aids the non-execution of a power. (a) And although creditors in these cases prevail over volunteers, yet if a party taking under a voluntary appointment sell to a person *bond fide*, and for a valuable consideration, such person, in analogy to the decisions on the statute of voluntary conveyances, will be preferred to the creditors, as having a preferable equity to them. (b)

(y) *Thompson v. Towne*, 2 Vern. 319; 30 L. J. Ch. 309, per Lord J. Turner. *Hinton v. Toye*, 1 Atk. 465; *Bainton v. Ward*, 2 Atk. 172; *Townsend v. Windham*, 2 Ves. sen. 9; *Pack v. Bathurst*, 3 Atk. 269; *Troughton v. Troughton*, 3 Atk. 656; *George v. Milbanke*, 9 Ves. 190; *Jenny v. Andrews*, 6 Madd. 264; *Platt v. Routh*, 6 M. & W. 789. But this doctrine does not apply to the case of an appointment by will of a married woman of property settled to her separate use for life, unless she has been guilty of fraud in her contracts. *Vaughan v. Vanderstegen*, 2 Drew. 165, 363. *Hobday v. Peters*, 28 Beav. 354; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Shattock v. Shattock*, L. R. 2 Eq. 182. But see *Johnson v. Gallagher*, 30 L. J. Ch. 309, per Lord J. Turner. Moreover, it has been held that resort cannot be had, in any case, to the appointed property, till all the testator's own property has been exhausted. *Fleming v. Buchanan*, 3 De G., M. & G. 976.

(z) As to wills made or republished since the year 1837, every residuary bequest operates as a testamentary appointment, unless a contrary intention appears. See stat. 1 Vict. c. 26, s. 27, preface; 2 *Jarman on Wills*, 650, 3d ed.

(a) *Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206.

(b) *George v. Milbanke*, 9 Ves. 190; *Hart v. Middlehurst*, 3 Atk. 377; 2 Sugd. Pow. 29, 6th ed.

* CHAPTER THE SECOND.

OF REAL ASSETS: AND OF THE EXONERATION OF THE REAL ESTATE BY THE PERSONAL: AND HEREWITH OF THE MARSHALLING OF ASSETS.

SECTION I.

Of Real Assets, and therewith of the Exoneration of the Real Estate by the Personal.

BESIDES the liability of the executor or administrator in respect of the personal assets in his hands, the heir of the deceased is liable, at the common law, to the extent of the real assets descended, for the payment of his ancestor's debts of a certain quality; viz, those due on bonds, covenants, or other specialties, in cases where the deceased bound himself and his heirs. (a)

It is not thought necessary to discuss, in this place, what portion of the real property of the deceased the law regards as assets by descent; nor to investigate the circumstances under which the real assets are to be considered as legal or equitable. Questions of this nature are rather matters between the heir and the creditors, than relative to the office of an executor or administrator, and therefore appear foreign to the subject of this treatise.

Creditors by specialties which affected the heir, provided he had assets by descent, had not, at common law, the same remedy against the devisee of their debtor. To obviate this mischief, the statute of 3 W. & M. c. 14, passed; which has been lately repealed and reënacted with additional provisions

(a) The heir is also liable on a judgment recovered against his ancestor, or a recognizance acknowledged by him; but he is chargeable only as *tenant of the lands* and not as heir; and therefore an action of debt does not lie against him on the judgment or recognizance, as it does on the bond of his ancestor, but a *scire facias* only, to have execution of the lands in his hands. 2 Saund. 7, note (4) to *Jeffreson v. Morton*.

[1687] [1688]

calculated to remedy certain omissions in the former statute. By statute 11 Geo. 4 and 1 W. 4, c. 47, after reciting that ^{1 W. 4,} “it is not reasonable or just that by the practice or ^{c. 47.} contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having, by bonds, *covenants*, (*b*) or other specialties, bound themselves and their heirs, and have afterwards died seised in fee-simple of and in manors, messuages, lands, tenements, and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts;” it is, by section 2, enacted, “that all wills and testamentary limitations, dispositions or appointments, already made by persons now in being, or hereafter to be made by any person or persons, *whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments, or any rent, profit, term, or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them, with whom the person or persons making any such wills or testaments, limitations, dispositions, or appointments, shall have

(*b*) The former statute, giving the specialty creditor a remedy against the devisee (3 W. & M. c. 14), did not extend to damages for breaches of covenant or contracts under seal made by the testator; and it was therefore held that an action of covenant did not lie upon this statute against the heir and devisee to recover damages for a breach of covenant made by the deviser, but the remedy thereby given was confined to cases where debt lies. *Wilson v. Knubley*, 7 East, 128. It was further held, in the construction of the old statute, that it applied only where a debt, in the ordinary sense of the word, existed between the parties in the lifetime of both; and therefore that an action of debt

did not lie against the devisee of a surety in respect of breaches of covenant which did not occur in the lifetime of the testator, even though the damages were liquidated, so that in form they might be sued for in an action of debt. *Farley v. Briant*, 3 Ad. & El. 839. But such damages, though not a debt within this statute, are a debt payable out of the real estate of the testator, under a charge of debts thereon created by his will. *Morse v. Tucker*, 5 Hare, 79. And a debt due on a covenant, though it be *debitum in presenti solvendum in futuro*, was held to be within the statute. *Coope v. Cresswell*, L. R. 2 Eq. 106, *coram Kindersley V. C.*

entered into any bond, *covenant*, or other specialty, binding his, her, or their heirs) to be fraudulent, and clearly, absolutely, and utterly void, frustrate, and of none effect; (c) any pretence, color, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding."

Sect. 3. "For the means that such creditors may be enabled to recover upon such bonds, *covenants*, and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt or *covenant* upon the said bonds, covenants, and specialties against the heir and heirs-at-law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first mentioned devisee or devisees jointly by virtue of this act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended." (d)

Sect. 4. "If in any case there shall not be any heir-at-law * against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor to whom by this act relief is given shall and may have and maintain his, her, and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid." (e)

Sect. 9. "From and after the passing of this act, where any Real assets of trader. person being, at the time of his death, a trader, within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, or other real estate, which he shall not by his last will have charged with or devised subject to or for the payment of his debts, and which would be assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts

(c) It is not necessary to make the devise void that the intent of the devise was to defraud or hinder or delay creditors. *Coope v. Cresswell*, L. R. 2 Eq. 166.

(d) The mere liability of the devisee to be sued under this act does not make the

debt his debt. In re Taylor's Estate, 8 Ex. 384.

(e) This section is new. Under the stat. of W. & M., the specialty creditor could not maintain an action against the devisee alone, there being no heir. *Hunting v. Sheldrake*, 9 M. & W. 256.

of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, devisee or devisees of such debtor, and the devisee or devisees of such first mentioned devisee or devisees, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by specialty, in which the heirs were bound. Provided always, that in the administration of assets by courts of equity under and by virtue of this provision, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands." (f)

Further, by the stat. 3 & 4 W. 4, c. 104, after reciting * it is expedient that "the payments of the debts of all persons shall be secured more effectually," it is enacted, "that from and after the passing of this act (29th August 1833), when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, (g) the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; (h) and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor,

3 & 3 W.
4, c. 104.

Freehold
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gust, 1833,
in all cases
to be assets
for the
payment of
simple
contract or
specialty
debts.

(f) In the construction of the repealed statute, 47 Geo. 3, sess. 2, c. 74, which had the same object, it was held that the act applied only to persons who were traders at the time of their decease, and not to persons who had left off trade before they died. *Keene v. Riley*, 3 Meriv. 436; *Hitchon v. Bennett*, 4 Madd. 180.

(g) See *Ball v. Harris*, 4 My. & Cr. 268.

(h) Freeholds over which a testator has a general power of appointment, and which he appoints by a last will, are within this act (but are only applicable as assets after all the testator's own property has been

previously so applied). *Fleming v. Buchanan*, 3 De G., M. & G. 976. [The rule generally prevails in the American States, that the real estate of the deceased testator or intestate may be subjected to the payment of his debts equally, in all cases, with the personal estate. 4 Kent, 421, 422; *Pratt v. Sinclair*, 6 Ohio, 227. As to the circumstances and mode of proceeding, see *ante*, 650, note (d¹); *Hannum v. Day*, 105 Mass. 33; Genl. Sts. Mass. c. 96, §§ 7, 8; c. 102, § 1 *et seq.* As to the sale of real estate for the payment of legacies, see *post*, 1704, 1705, and note (k).]

shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound. Provided always, that in the administration of assets by courts of equity, under and by virtue of this act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands." (i)

It was held by Sir L. Shadwell V. C. in *Spackman v. * Timbrell*, (j) that the repealed statutes (3 W. & M. c. 14, and 47 Geo. 3, sess. 2, c. 74) did not specifically charge the real assets descended or devised with the debts of the ancestor, but made the heir or devisee liable, *personally*, to answer for the value of the assets descended or devised. Therefore, where H., who was a trader at his death, and indebted by specialty and simple contract, devised freehold estates to his son in fee; and the son, on his marriage, settled the estates on his wife and children, and afterwards died; his honor decided that the son's widow and children were entitled to hold the estates discharged from the debts of the father. So in *Richardson v. Horton*, (k) a settlement by the heir, upon his marriage, of the ancestor's estates was supported against the claims of the specialty creditors of such ancestor. And Lord Langdale M. R. laid down that though by taking proper proceedings, the specialty creditors may obtain payment out of the descended or devised real estate in the hands of the heir or devisee, yet if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated. (k¹) And there does not ap-

(i) Therefore, a creditor by bond, in which the heirs are named, must be paid before a creditor by bond in which they are not named. *Richardson v. Jenkins*, 1 Drew. 477.

(j) 8 Sim. 253.

(k) 7 Beav. 112.

(k¹) [See *Ticknor v. Harris*, 14 N. H. 272. In North Carolina the creditors of a deceased intestate are entitled, when there is no personal estate, to the whole of the land descended, or the price which has been received for it, until their debts are paid; and when some of the heirs of the

pear to be any reason why these decisions should not be applied to the construction of the statutes now in operation (1 W. 4, c. 47, and 3 & 4 W. 4, c. 104). (*l*)

* It is, however, a well known rule, that, as between the real and personal representatives of all persons deceased, the personal estate in the hands of the executor or administrator is the primary and natural fund, which must be resorted to in the first instance for the payment of

Primary liability of personal estate to debts of every description:

deceased have sold the lands descended to them, two years after administration granted, they are liable to the creditors for the whole of the price received and not for their aliquot share of the debt itself; and those who retain their several shares are liable for the present value of them. *Hinton v. Whitehurst*, 71 N. Car. 66. So the creditors are entitled to the rents and profits actually received by the heirs from the lands descended. If the land has been sold, the interest is the profit; and if the heir still retains his share, he is equally liable for the profits, which may be ascertained by taking the account in the usual way. *Hinton v. Whitehurst*, *supra*; *Moore v. Shields*, 68 N. Car. 327. It has been held in New Hampshire that under the statutes in force in that state, any creditor of an estate administered in the insolvent course, whose demand depended on a contingency, so that it could not be allowed by the commissioners, has a remedy against the heir and devisee. But the statute which authorizes the bringing of an action against heirs and devisees jointly, intends by heirs those only who have actually inherited. *Ticknor v. Harris*, 14 N. H. 272. It was further declared in this case that there is no provision of the common law, or by any English statute before the revolution, or by any statutes of New Hampshire, for an action by a creditor of an estate against a legatee.]

(*l*) See the observations of Lord Cottingham in *Pimm v. Insall*, 1 Mac. & G. 458; and of Romilly M. R. in 22 Beav. 21, 22. See, also, *Dilkes v. Broadmead*, 2 Giff. 113. A covenant by an infant heiress and her intended husband, in mar-

riage articles, to settle the descended estate on the issue of the marriage, is not an alienation such as to withdraw the estate from the claim of the ancestor's creditors. 1 Mac. & G. 449; 7 Hare, 193. Nor is a judgment entered up against an heir such an alienation. *Kinderley v. Jervis*, 22 Beav. 1. It has been held that the stat. 3 & 4 W. 4, c. 104, makes the lands themselves, and not merely the estate or interest of the deceased, assets for the payment of his debts. Therefore, if he dies without heirs, they are made assets against the lord claiming by escheat, notwithstanding his right is by title paramount. *Evans v. Brown*, 5 Beav. 114; *Downe v. Morris*, 3 Hare, 399; *Hughes v. Wells*, 9 Hare, 749. It has also been held that the act charges the real estate of the deceased owner (where no such charge has been made by will), not only with debts of every description actually due at his death, but also with all liabilities which may result out of the obligations entered into by him during his life. *Hamer's Devisees' case*, 2 De G., M. & G. 566, overruling the decision in 3 De G. & Sm. 279. See, also, *Beale v. Symonds*, 16 Beav. 406. In order to obtain a decree for a sale for payment of the debts it is not necessary that the bill should be filed by a creditor. *Dinning v. Henderson*, 2 Coll. 330; *Price v. Price*, 15 Sim. 484; *Rodney v. Rodney*, 16 Sim. 307. But the legal personal representative ought not to be sole plaintiff. *Tubby v. Tubby*, 2 Coll. 136; *Catley v. Sampson*, 33 Beav. 551. The widow's right to dower is not affected by the act. *Spyer v. Hyatt*, 20 Beav. 621.

debts of every description, contracted by the testator or intestate. (¹)

(¹) [The order of the application of the several funds liable to the payment of debts is, according to Mr. Jarman [vol. 2 (3d Eng. ed.), 588-590], as follows: 1st. The general personal estate, not expressly or by implication exempted; and the same rule prevails in the American States. 1 Lead. Cas. in Eq. [521,] 622 *et seq.*, 638 *et seq.*, in notes to *Ancaster v. Mayer*; *Lupton v. Lupton*, 2 John. Ch. 614; *McCampbell v. McCampbell*, 5 Litt. 95; *Hoye v. Brewer*, 3 Gill & J. 153; *Wyse v. Smith*, 4 Gill & J. 295; *Stephens v. Gregg*, 10 Gill & J. 143; *Gibson v. McCormick*, 10 Gill & J. 65; *Chase v. Lockerman*, 11 Gill & J. 185; *Waring v. Waring*, 2 Bland, 673; *Cornish v. Wilson*, 6 Gill, 301; *Post v. Mackall*, 3 Bland, 486; *Tessier v. Wise*, 3 Bland, 28; *Garnet v. Macon*, 2 Brock. 125; S. C. 6 Call, 208; *Dunlap v. Dunlap*, 4 Desaus. 305, 329; *Haleyburton v. Kershaw*, 3 Desaus. 105; *Stuart v. Carson*, 1 Desaus. 500; *Brown v. James*, 3 Strobb. Eq. 24; *Livingston v. Livingston*, 3 John. Ch. 148; *M'Kay v. Green*, 3 John. Ch. 50; *Livingston v. Newkirk*, 3 John. Ch. 614; *Rogers v. Rogers*, 1 Paige, 188; *Morris v. Mowatt*, 2 Paige, 587; *Mollan v. Griffith*, 3 Paige, 402; *Hawley v. James*, 5 Paige, 318; *Schermerhorn v. Barhydt*, 9 Paige, 29, 49; *Kelsey v. Western*, 2 Comst. 500; *Harris v. Fly*, 7 Paige, 427; *Hoes v. Van Hoesen*, 1 Barb. Ch. 379; *Hays v. Jackson*, 6 Mass. 149; *Seaver v. Lewis*, 14 Mass. 83; *Adams v. Brackett*, 5 Met. 280; *Hancock v. Minot*, 8 Pick. 29; *Hewes v. Dehon*, 3 Gray, 206; *Gore v. Brazier*, 3 Mass. 523; *Lewis v. Thornton*, 6 Munf. 87; *Foster v. Crenshaw*, 3 Munf. 514; *McLoud v. Roberts*, 4 Hen. & Munf. 443; *Dandridge v. Minge*, 4 Rand. 397; *Elliott v. Carter*, 9 Grattan, 549; *Miller v. Harwell*, 3 Murph. 195; *Stroud v. Barnett*, 3 Dana, 394; *Hull v. Hull*, 3 Rich. Eq. 65; *Marsh v. Marsh*, 10 B. Mon. 360; *Sims v. Sims*, 2 Stockt. Ch. 158; *Clinefetter v. Ayres*, 16 Ill. 329; *Walker's Estate*, 3 Rawle, 229; *Ruston v. Ruston*, 2 Yeates, 54; *Todd v. Todd*, 1 Serg. & R. 453; *Holman's Appeal*, 24 Penn. St. 174; *Martin v. Frye*, 17 Serg. & R. 426; *Hoover v. Hoover*, 5 Penn. St. 351; *Robards v. Wortham*, 2 Dev. Eq. 173; *Palmer v. Armstrong*, 2 Dev. Eq. 268; *Leavitt v. Wooster*, 14 N. H. 551; *Perry v. Hale*, 44 N. H. 365 *et seq.*; 4 Kent, 420, 421; 1 Story Eq. Jur. § 571; *Vandeleur v. Vandeleur*, 3 Cl. & Fin. 82, 98. 2dly. Lands expressly devised to pay debts, whether the inheritance or a term carved out of it be so limited. *Anon.* 2 Ventr. 349; *Bateman v. Bateman*, 1 Atk. 421; *Phillips v. Barry*, 22 Beav. 279; *Coxe v. Bassett*, 3 Ves. 155; *Tweedale v. Coventry*, 1 Bro. C. C. 240; *Lanoy v. Duke of Athol*, 2 Atk. 444; *Hays v. Jackson*, 6 Mass. 151; *Hoover v. Hoover*, 5 Penn. St. 351; *Robards v. Wortham*, 2 Dev. Eq. 173. 3dly. Estates which descend to the heir, whether acquired before or after the making of the will. *Chaplin v. Chaplin*, 3 P. Wms. 368; *Galton v. Hancock*, 2 Atk. 424; *Manning v. Spooner*, 3 Ves. 117; *Barnewall v. Lord Cawdor*, 3 Madd. 453; *Robards v. Wortham*, 2 Dev. Eq. 173; *Elliott v. Carter*, 9 Grattan, 549; *Warley v. Warley*, 1 Bailey Eq. 397; *Brooks v. Dent*, 1 Md. Ch. 523. But in *Hays v. Jackson*, 6 Mass. 149, where the testator ordered all his debts to be paid, made a specific devise of certain lands to his sister, and devised all the residue of which he should die seised, to a residuary devisee; and he died seised of land purchased after the making of the will, and which formerly in Massachusetts did not pass thereby; and the executors applied for license to sell real estate for the payment of debts, the court directed them first to sell the devised lands not included in the specific devise, and next the lands which descended to the heirs. See *post*, 1710, note (y). It has, however, since this decision, been provided by statute in Massachusetts, that where part of the real es-

But it is clear that this principle can only regulate the equitable administration of assets, and does not extend to the legal

tate of the testator descends to his heirs, by reason of its not being devised or disposed of by his will, and his personal estate is insufficient for the payment of his debts, the undevised real estate shall be first chargeable with the debts, in exoneration, as far as it will go, of the real estate devised, unless it appears from the will that a different arrangement of his assets for the payment of his debts was made by the testator. Genl. Sta. c. 92, § 34. 4thly. Real or personal property devised or bequeathed, either to the heir or a stranger, charged with debts and disposed of, subject to such charge. *Wride v. Clarke*, 2 Bro. C. C. 261, n.; *Hoover v. Hoover*, 5 Penn. St. 351; *Manning v. Spooner*, 3 Ves. 117; *Harmood v. Oglander*, 8 Ves. 124; *Robards v. Wortham*, 2 Dev. Eq. 173; *Watson v. Brickwood*, 9 Ves. 447; *Elliott v. Carter*, 9 Grattan, 549; *Irvin v. Ironmonger*, 2 Russ. & My. 531; *Kirkpatrick v. Rogers*, 7 Ired. Eq. 44; *Mitchell v. Mitchell*, 3 Md. Ch. 73; *Milnes v. Slater*, 8 Ves. 306; *Donne v. Lewis*, 2 Bro. C. C. 257. But since the act 1 Vict. c. 26, realty included in a general or residuary devise, must be exhausted before having recourse to specifically devised realty. *Harris v. Watkins*, Kay, 448. 5thly. Real estate comprised in a general or residuary devise. *Dady v. Hartridge*, 1 Dr. & Sm. 236; *Rotheram v. Rotheram*, 26 Beav. 465. 6thly. General pecuniary legacies *pro rata*. *Clifton v. Burt*, 1 P. Wms. 680; *Headley v. Redhead*, Coop. 50. 7thly. Specific legacies, and real estate specifically devised, are liable, *pro rata*, to contribute to the payment of debts by specialty in which the heirs are bound; and also, it is conceived, to the payment of debts by simple contract, and by specialty in which the heirs are not bound. *Long v. Short*, 1 P. Wms. 403; *Tombs v. Roch*, 2 Coll. 490; *Gervis v. Gervis*, 14 Sim. 655; *Young v. Hassard*, 1 Jo. & Lat. 472; *Chase v. Lockerman*, 11 Gill & J. 185; *Alexander v.*

Worthington, 5 Md. 493; *Skidmore v. Romaine*, 2 Bradf. Sur. 132; *Teas's Appeal*, 23 Penn. St. 223. Where debts remain unsatisfied, after the personal estate, and all the real estate not devised, are exhausted, the devisees must make up the deficiency of assets according to the quantum and value of their respective interests. *Livingston v. Livingston*, 3 John. Ch. 158, 159. The heir is not entitled to contribution from the devisee towards satisfaction of creditors. Nor does equity help a pecuniary legatee to throw the debt against the personal estate, upon the devisee of land, for their equities are equal. *Livingston v. Livingston*, 3 John. Ch. 158. "There seems to be no authority or reason for holding that lands specifically devised are liable to be sold for the payment of specific legacies. The most that the legatees can claim is that they should be put on an equal footing with the devisees; and that the latter, in case of a deficiency of assets, should be held to contribute. But as to this we give no opinion." *Wilde J. in Hubbell v. Hubbell*, 9 Pick. 561, 562. 8thly. Real and personal property which the testator has power to appoint, and which he has appointed by his will. *Fleming v. Buchanan*, 3 De G., M. & G. 976; *Hawthorn v. Shedden*, 3 Sm. & Gif. 305. "The order of marshalling assets in equity towards the payment of debts," according to Chancellor Kent, "is to apply, (1) the general personal estate; (2) estates specially devised for the payment of debts; (3) estates descended; (4) estates devised, though generally charged with the payment of debts. It requires express words, or the manifest intent of a testator, to disturb this order." 4 Kent, 421. See *Parsons C. J. in Hays v. Jackson*, 6 Mass. 151, 152; *Schermerhorn v. Barhydt*, 9 Paige, 29, 49; *M'Dowell v. Lawless*, 6 Monr. 141. While creditors, for the payment of their claims, are not generally confined to the general order in which a deceased person's estate is to be applied to

control of the creditor deceased; for it is discretionary with him, if his debt is of a nature to bind both the real and personal estate, whether he will resort to the personal estate in the hands of the executor, or to the real estate descended or devised. Hence, if the obligee of a bond bring an action of debt against the heir, he cannot plead that there is an executor who has assets. (m)

In order, therefore, to support and enforce the primary liability of the personal estate, as between the representatives of the deceased debtor, it is an established rule in equity, that if the creditor proceeds against the real estate, descended or devised, the heir or devisee, who has sustained the loss, shall be allowed to stand in the place of the specialty creditor, to reimburse himself out of the personal estate in the hands of the executors. (n) Provided such reimbursement * will not prejudice *any of the creditors, or any other party having an equal or a more favored claim* than the heir or devisee respectively.

Thus, if the testator enters into a bond for himself and his heirs, and dies, and the obligee proceeds against the heir, and compels him to pay the debt out of the real assets, the heir may recover it out of the assets in the hands of the executor. (o) And this

the payment of his debts, legal representatives, heirs, legatees, and devisees have rights for relief against each other in case this order is disarranged; for instance, if land, specifically devised, is taken for the payment of debts, the specific devisee may call upon the legal representatives to make up his loss from the personal estate in his hands; if that has been already exhausted he may call upon the land that was specifically devised for the payment of debts; if that has been applied, he may call upon the heir to whom any part of the real estate has descended; if such land has been already taken, then the specific devisees shall contribute ratably to each other. 2 Perry Trusts, § 566; Livingston v. Livingston, 3 John. Ch. 148; Blaney v. Blaney, 1 Cush. 107; Genl. Sts. Mass. c. 92, §§ 29-36.]

(m) Bro. Assets, per Descent, 33; Davy v. Pepys, Plowd. 439 b; Quarles v. Capell, Dyer, 204 b; Davies v. Churchman, 3 Lev. 189; Galton v. Hancock, 2 Atk. 426.

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(n) Treat. Eq. bk. 3, c. 2, s. 1. Accordingly, where a person domiciled in England, who was indebted in money upon bond, died intestate, leaving real estate in Scotland, and the bond debts were paid by the heir out of the produce of the real estate in Scotland, Lord Langdale M. R. held that the right of relief or demand against the personal estate, which, by the law of Scotland, is given to the heir who has paid movable debts, is capable of being made available in England. Winchelsea v. Garety, 2 Keen, 293. And in all cases where, in the course of administrations in different countries, the question arises whether particular debts are properly and ultimately payable out of the personal estate, or are chargeable on the real estate of the deceased, the law of his domicile will govern, in cases of intestacy, and, in cases of testacy, his intention. Story's Confli. ch. xiii. s. 528.

(o) Armitage v. Metcalf, 1 Chanc. Cas. 74; Anon. 2 Chanc. Cas. 5; Treat. Eq. bk. 3, c. 2, s. 1.

exoneration is extended not only to the *hæres natus*, the heir-at-law, but also to the *hæres factus*, the general devisee, (*p*) or a particular devisee. (*q*)

Again, it is discretionary with a mortgagee, whether he will proceed, for the recovery of his mortgage debt, against the mortgaged land which has come to the heir or devisee of the mortgagor, or against his executor. (*q*¹) But if the mortgagee recovers against the land, the heir or devisee shall (unless the case is within the operation of the stat. 17 & 18 Vict. c. 113, *post*, 1702) be reimbursed out of the personal estate of the mortgagor. (*r*)

(*p*) *Lutkins v. Leigh*, Cas. temp. Talb. 54; *Galton v. Hancock*, 2 Atk. 436.

(*q*) *Pockley v. Pockley*, 2 Chanc. Cas. 84; *S. C. nomine Popley v. Popley*, 1 Vern. 36; *Galton v. Hancock*, 2 Atk. 436; *Fonbl. Treat. Eq. bk. 3, c. 2, s. 3, note (e)*.

(*q*¹) [*Thomas J. in Hewes v. Dehon*, 3 Gray, 207.]

(*r*) *Cope v. Cope*, 2 Salk. 449; *Howel v. Price*, 1 P. Wms. 292; *Johnson v. Milk-sopp*, 2 Vern. 112; *Lutkins v. Leigh*, Cas. temp. Talb. 54; *Galton v. Hancock*, 2 Atk. 436. [The general rule of law, in the absence of any expressed intent, is that debts contracted by the testator, although secured by mortgage, are to be paid out of his personal property to the exoneration of his real estate. *Gray J. in Plimpton v. Fuller*, 11 Allen, 140; *Seaver v. Lewis*, 14 Mass. 83; *Hewes v. Dehon*, 3 Gray, 205; *Towle v. Swasey*, 106 Mass. 100, 106; *Andrews v. Bishop*, 5 Allen, 490; *Gould v. Winthrop*, 5 R. I. 319; *Bradford v. Forbes*, 9 Allen, 365; *Adams's Eq.* 261, note (2) and cases cited; *McLenahan v. McLenahan*, 3 C. E. Green, 101. So if lands be devised which are held under a contract of sale, and the purchase-money is not paid, the devisee is entitled to have it paid out of the personal estate of the testator. *Lamport v. Beeman*, 34 Barb. 239; *McCracken's Appeal*, 29 Penn. St. 426.] And it will make no difference that the devise is of the lands *subject to the incumbrances thereon*; for such a qualification is no more than what is implied, since the testator could not devise them otherwise. *Serle v. St. Eloy*, 2 P.

Wms. 386; *Bickham v. Cruttwell*, 3 My. & Cr. 769; *Hickling v. Boyer*, 3 Mac. & G. 643, by Lord Truro. Accordingly, where a testator directed estates to be sold, and the produce to be applied in payment of the mortgages due from him, and the residue of the produce to be considered and applied as part of the residue of his personal estate; and he gave and devised the residue of his real and personal estate upon trust, after payment of his just debts, for the benefit of all his children; and the testator afterwards, by a codicil, confined the residuary gift of the produce of the estates directed to be sold to his younger children; it was held that the devisees of the produce of the real estate directed to be sold were entitled to have the personal estate applied in payment of the mortgages, because the gift was in effect a gift of the estates, subject to the mortgages; and the gift of an estate subject to a mortgage does not deprive the devisee of the right to satisfaction of the mortgage out of the personal estate. *Wythe v. Henniker*, 2 My. & K. 635. But where a testator having an estate subject to a mortgage of 4,460*l.* created by himself, devised it to A. B. in fee, "he paying the mortgage thereon;" and devised his residuary real and personal estates to trustees, for the payment of his debts, and he gave to the mortgagees, through the medium of his executors, 2,000*l.* to exonerate the estate; it was held that the words, "he paying the mortgage thereon," imposed a duty on the devisee, and amounted to a direction or condition that he should

* But the land cannot be exonerated out of the personal estate to the prejudice of any person having a prior claim to be satisfied. And therefore the heir or devisee shall not stand in the place of the mortgagee against the personal assets, if by so doing he would disappoint any creditor, (*s*) or any legatee, except the residuary legatee, (*t*) or his wife's claim to *paraphernalia*. (*u*)

* It has, indeed, been laid down, as a general proposition, that the equity, to have the personal estate applied to the exoneration of the real, subsists only between the heir or devisee, and the residuary legatee, and not against specific or general legatees. (*x*) And this is unquestionably true with respect to the exoneration of the heir. (*y*) But it appears to be clear that if a creditor, with a *general* lien on the land, as a mere bond creditor, recovers the bond debt against the real estate *devised*, the devisee will be entitled to exoneration out of the personal estate, to the disappointment of general legacies. (*z*) Whether he would also be entitled to exoneration to the disappointment of *specific* legacies, is a question which, for some time, was doubtful. (*a*) But it seems to be now settled, that the devisee would be entitled to compel the specific legatees to *contribute* to the payment of the debt, but not wholly to exonerate the land. (*b*) It should, however, be observed,

pay the mortgage, or take the estate, subject to the burden upon it, so far as the same exceeded 2,000*l*. *Lockhart v. Hardy*, 9 Beav. 379. See, also, *Goodwin v. Lee*, 1 Kay & J. 377; *Hatch v. Skelton*, 20 Beav. 453.

(*s*) *Bartholomew v. May*, 1 Atk. 487. [See *Van Vechten v. Keator*, 63 N. Y. 52; *post*, 1704, note (*f*).]

(*t*) *O'Neal v. Mead*, 1 P. Wms. 693; *Lutkins v. Leigh*, Cas. temp. Talb. 53; *Davis v. Gardiner*, 2 P. Wms. 190; *Rider v. Wager*, 2 P. Wms. 335. *A fortiori*, a specific legatee of a mortgaged leasehold shall not have contribution towards his mortgage from other specific legatees of leasehold. *Halliwell v. Tanner*, 1 Russ. & My. 633; *Wythe v. Henniker*, 2 My. & K. 635; *Johnson v. Child*, 4 Hare, 87. *Secus*, where a contrary intention is apparent. *Middleton v. Middleton*, 15 Beav. 450.

(*u*) *Tipping v. Tipping*, 1 P. Wms. 736; *ante*, 768, note (*u*).

(*x*) *Hamilton v. Worley*, 2 Ves. jr. 65;

Fonbl. Treat. Eq. bk. 3, c. 2, s. 3, note (e); [McCracken's Estate, 29 Penn. St. 426.]

(*y*) *Lutkins v. Leigh*, Cas. temp. Talb. 54; *Snelson v. Corbet*, 3 Atk. 369.

(*z*) It is clear that general legatees cannot marshal the assets so as to stand in the place of a mere bond creditor against the land *devised*. See *post*, 1717. And therefore it seems to follow, that the devisee shall be exonerated out of the general legacies; besides, if it were otherwise, it would have the effect of making a devisee of land, who in every case is as much a specific devisee as a legatee of a specific legacy, bear the burden of the debt, before the general pecuniary legatees.

(*a*) See *Cornwall v. Cornwall*, 12 Sim. 298.

(*b*) *Long v. Short*, 1 P. Wms. 403; *Young v. Hassard*, 1 Jones & Lat. 466; *Tombs v. Roch*, 2 Coll. 490; *Gervis v. Gervis*, 14 Sim. 654; *Hensman v. Fryer*, L. R. 3 Ch. App. 420. But see *Bateman v. Hotchkin*, 10 Beav. 426; *post*, 1718,

that a residuary devise has been held to be not specific since the new wills act (1 Vict. c. 26), (c) and, if this be so, these doctrines, since the act, are only applicable to a specific devisee.

* It must be further observed that the exoneration of the real estate out of the personal is confined to cases where the claim in question is the *proper debt* of the deceased; for if it be not so, his heir or devisee must take the land *cum onere*. (c¹) Thus, if a settler of real estate in contemplation of marriage covenants for payment of the portions of children, or widow's jointure, (d) or if a person makes a voluntary gift, by way of charge, and covenants for the payment of the money, (e) the land will be the primary fund for payment; for in these cases the charge is in its nature real and the covenant only an additional security. Accordingly in *Graves v. Hicks*, (f) a father having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose, and covenanted to pay the money. By his will he directed his debts to be paid, first out of the residue of his personal estate, then out of his money in the funds, and lastly, out of his residuary real estates. And Sir L. Shadwell V. C. held that the mortgaged estate was not to be exonerated from the portion, out of the personal estate; his honor being of opinion that, by the plain intention of the parties, the covenant of the father was meant to be auxiliary only to the charge upon his land; and that what he contracted to do, was to give security for the marriage portion. (g)

Again, if a man buys an estate, subject to an existing mortgage, the land remains the proper fund for its discharge, and the heir or devisee of the purchaser cannot throw the debt on the personal estate, as the primary fund for payment. (h) * So if an estate

note (e). [See *ante*, 1693, note (l¹); *post*, 1718, and note (d).]

(c) *Dady v. Hartridge*, 1 Dr. & Sm. 236; *Barnwell v. Iremonger*, Ib. 242; *Rotheram v. Rotheram*, 26 Beav. 465; *Bethell v. Green*, 34 Beav. 302; *Rodhouse v. Mold*, 35 L. J. Ch. 67. But see, *contra*, *Eddels v. Johnson*, 1 Giff. 22; *Pearmain v. Twiss*, 2 Giff. 130; *Emuss v. Smith*, 2 De G. & Sm. 722; *Clark v. Clark*, 34 L. J. N. C. Ch. 477, *coram* Stuart V. C. But see, *contra*, *Hensman v. Fryer*, L. R. 3 Ch. App. 420.

(c¹) [Thomas J. in *Hewes v. Dehon*, 3 Gray, 207; *Cumberland v. Codrington*, 3 John. Ch. 257.]

(d) *Lanoy v. Athol*, 2 Atk. 444; *Edwards v. Freeman*, 2 P. Wms. 438; *Coventry v. Coventry*, 2 P. Wms. 222; *Loosemore v. Knapman*, Kay, 123. But see *Field v. Moore*, 7 De G., M. & G. 691.

(e) *Wilson v. Darlington*, 1 Cox, 172; S. C. 2 P. Wms. 664, in the notes; *Ex parte Digby*, 1 Jac. 253; *Coote Mortg.* 588, 2d ed.

(f) 6 Sim. 398.

(g) See, also, *Ibbetson v. Ibbetson*, 12 Sim. 206; *Jenkinson v. Harcourt*, Kay, 688:

(h) *Coote Mortg.* 578, 2d ed.; [*Hewes v. Dehon*, 3 Gray, 206, 208; *Andrews v.*

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descends on an heir-at-law, (*i*) or is devised, (*j*) charged with a mortgaged debt, and the heir or devisee dies, leaving the debt unpaid, the land will be the fund for its payment, and not the personal estate of the deceased heir or devisee. Thus, in *Scott v. Beecher*, (*k*) a person seised of an estate, subject to a mortgage created by himself, devised all his real and personal estate to his wife absolutely, and appointed her executrix. The residuary personal estate was more than sufficient to discharge the mortgage, which was, however, continued on the estate during the life of the widow, who died intestate, leaving her brother her heir-at-law. Administration *de bonis non* to the effects of the husband, and also administration to the effects of the wife, were granted to the defendants against whom the brother filed his bill, claiming to be indemnified against the mortgage, out of the personal estate of the husband. But Sir John Leach V. C. rejected the claim, chiefly on the ground, that although the residuary personal estate of the husband had, by the will, become the property of the wife, yet the debt of her husband not having become her debt, her heir-at-law had no claim to be indemnified out of her personal estate against the debt of another person. (*l*)

* And even a direct and original mortgage made by the person to whom land has descended or been devised, will not operate to make his personal estate the primary fund for the discharge of the mortgage debt, if the money borrowed was for the purpose of paying off the debts (*m*) or legacies (*n*) of the ancestor or de-

Bishop, 5 Allen, 490; *Cumberland v. Codrington*, 3 John. Ch. 229, 257, 272; *Rogers v. Rogers*, 1 Paige, 188; *Hoff's Appeal*, 24 Penn. St. 203; *Thompson v. Thompson*, 4 Ohio St. 333.]

(*i*) *Noel v. Lord Henley*, Daniell's Rep. 322; S. C. 7 Price, 241; S. C. in Dom. Proc. 12 Price, 213; *Coote Mortg.* 583, 584, 2d ed.; *In re Leeming*, 3 De G., F. & J. 43.

(*j*) 2 P. Wms. 664, note to *Evelyn v. Evelyn*; *Coote Mortg.* 584, 2d ed.

(*k*) 5 Madd. 96; *Coote Mortg.* 584, 2d ed.

(*l*) See, also, accord. *Lord Ilchester v. Lord Carnarvon*, 1 Beav. 209; *Lord Clarendon v. Barham*, 1 Y. & Coll. C. C. 688; *In re Taylor's Estate*, 1 Ex. 384; *Swainson v. Swainson*, 6 De G., M. & G. 648;

Hepworth v. Hill, 30 Beav. 484, per Romilly, M. R. But in *Bond v. England*, 2 Kay & J. 44, James E. mortgaged real estate, and died intestate in 1850, leaving his father, Edward E., his heir-at-law and sole next of kin. Edward E. also died intestate, and without ever having obtained letters of administration to his son James. And it was held by Wood V. C. that the personal estate of James was liable, as between the heir and personal representative of Edward and James, to be applied in discharge of the mortgage debt.

(*m*) *Tankerville v. Fawcett*, 1 Cox, 237; S. C. 2 Bro. C. C. 57; *Perkyns v. Bayntun*, 2 P. Wms. 664 (note to *Evelyn v. Evelyn*); *Coote Mortg.* 586, 2d ed.

(*n*) *Basset v. Percival*, 1 Cox, 268; S. C. 2 P. Wms. 664, note; *Mattheson v.*

visor ; (*o*) and the law will be the same, if a bond (*p*) or note of hand (*q*) if given by the heir or devisee for the payment of debts or legacies charged on the land. However, in the case of *Barham v. Lord Thanet*, (*r*) a mortgage was made of the manor and lands of Silsden and other valuable estates, to secure a debt of 80,000*l.* and interest. The mortgagor died intestate, leaving the debt wholly unpaid ; and his heir, being pressed to pay off 30,000*l.*, part of the 80,000*l.*, procured a person to advance the sum required for the purpose, and the original mortgagee thereupon joined with the heir of the mortgagor in a deed conveying the manor and lands of Silsden to the person making the advance, subject to a proviso for redemption at the end of five years, being an equity of redemption, altogether different from the prior equity of redemption, and the interest reserved being five per cent. instead of four and a half per cent., which was the rate reserved in the original mortgage. And it was held by Sir J. Leach M. R. that it was in effect a new mortgage by the heir, and the 30,000*l.* was thereby constituted his personal debt. In *Townsend v. Mostyn*, (*s*) the rule was laid down by * Romilly M. R. that where the owner of property adds mortgages of his own to other mortgages created by his ancestor, and unites them together, and makes himself personally liable for the payment of the aggregate sum, the whole mortgage debt then becomes his debt.

It must here be observed, that although the debt is not originally the debt of the party, yet it is optional in him, by sufficient testimony of intention, to render the debt *his own* ; in which case his personal estate will, as between his real and personal representatives, become primarily liable to discharge the debt. (*t*)

But it requires clear evidence of intention to make the debt his own. (*t*¹) Thus a charge by will of debts, generally, on his real

Hardwicke, 2 P. Wms. 665, note ; *Billinghurst v. Walker*, 2 Bro. C. C. 604 ; *Hamilton v. Worley*, 2 Ves. jr. 62 ; *Cootes Mortg.* 586, 2d ed.

(*o*) 2 Bro. C. C. 604 ; 1 Cox, 268 ; *Cootes Mortg.* 586, 2d ed.

(*p*) *Billinghurst v. Walker*, 2 Bro. C. C. 604 ; *Woods v. Huntingford*, 3 Ves. 131, by Lord Alvanley ; *Cootes Mortg.* 587, 2d ed.

(*q*) *Mattheson v. Hardwicke*, 2 P. Wms. 665, note.

(*r*) 3 My. & K. 607. This case was followed by Romilly M. R. in *Bagot v. Bagot*, 34 Beav. 134.

(*s*) 26 Beav. 76.

(*t*) See *Bruce v. Morice*, 2 De G. & Sm. 389 ; [*Cumberland v. Codrington*, 3 John. Ch. 272.]

(*t*¹) [See *McLearn v. McLellan*, 10 Peters, 625 ; *Keyzey's case*, 9 Serg. & R. 73 ; 1 Story Eq. Jur. § 576 ; *Gibson v. McCormick*, 10 Gill & J. 66.]

and *personal* estate, will not be sufficient of itself to shift the *onus* from land which came to him already mortgaged, whether by descent, or by devise, or by sale. (*u*) So, in cases where the lands came to the deceased by descent or devise, his concurrence in the deed, and his personal covenant for payment of the money, on assignment or transfer of the mortgage, being only by way of additional security to the mortgagee, will not alter the burden, as between his real and personal representatives. (*x*) The same principle * applies if other estates are added to the security on a further sum being lent, (*y*) or if there be a covenant on his part for increasing the rate of interest. (*z*) And it seems that if the sums borrowed by him, and added to the original mortgage, be comparatively small, equity will not consider that he had different intentions as to the different sums, but will charge the real estate with the whole. (*a*) In case the deceased was a purchaser of the equity of redemption, the rule may, perhaps, be stated to be, that unless the mortgage money form part of the consideration money for the estate, (*a*¹) or the purchaser, by communication with the mortgagee, clearly take the mortgage debt on himself, it will be considered, as between his real and personal representatives, a charge on the land. (*b*) And the mere covenanting with the

(*u*) *Lawson v. Hudson*, 1 Bro. C. C. 58; S. C. 3 Bro. P. C. 424, Toml. ed.; *Ancaster v. Mayer*, 1 Bro. C. C. 454; *Hamilton v. Worley*, 2 Ves. jr. 62; S. C. 4 Bro. C. C. 199; *Butler v. Butler*, 5 Ves. 534; *Lord Ilchester v. Lord Carnarvon*, 1 Beav. 209. See *infra*.

(*x*) *Bagot v. Oughton*, 1 P. Wms. 347; *Evelyn v. Evelyn*, 2 P. Wms. 664; *Leman v. Newnham*, 1 Ves. sen. 52; *Barham v. Lord Thanet*, 3 My. & K. 607, 622; *Lord Ilchester v. Lord Carnarvon*, 1 Beav. 209; *Hedges v. Hedges*, 5 De G. & Sm. 330. So where there had been a mortgage of gavelkind lands, which, upon the death of the mortgagee intestate, descended to his two brothers as coparceners, and the elder brother, who was the common law heir of the mortgagor, purchased of the other brother his moiety of the gavelkind lands, and covenanted with him to pay the whole mortgage money; it was held that he did not thereby make the mortgage

money his personal debt. *Barham v. Lord Thanet*, 3 My. & K. 607.

(*y*) *Ancaster v. Mayer*, 1 Bro. C. C. 454, 464.

(*z*) *Shafto v. Shafto*, 1 Cox, 607; 2 P. Wms. 664, note.

(*a*) *Lewis v. Nangle*, Ambl. 150; S. C. 2 P. Wms. 664, note; *Coote Mortg.* 585, 586, 2d ed. This latter doctrine must, it should seem, be received with much caution. *Coote Mortg.* 586, 2d ed.

(*a*¹) [See *Hoff's Appeal*, 24 Penn. St. 200; *Lennig's Estate*, 52 Penn. St. 139.]

(*b*) 1 Sugd. V. & P. 310, 10th ed.; [(8th Am. ed.) 195.] Where, however, the deceased described himself, in his will, as having purchased a property, subject to a mortgage, but it appeared, on an examination of the history of the transaction, that he was the person who owed the money, although, as between himself and the mortgagee, he did not appear as the party who contracted the debt, *Lord Cottenham*

mortgagor to pay the debt will not make it his personal debt. (c) If, * however, the purchaser *borrow*s a sum of money to enable him to complete his contract, and the estate is, on the purchase, limited to the lender either for a term of years, or in fee, by way of mortgage, the debt is the proper debt of the purchaser, and his personal estate will be primarily liable, even although part of the money borrowed be applied in discharge of an existing mortgage. (d)

By stat. 17 & 18 Vict. c. 113, it is enacted that "when any person shall, after December 31st, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, (e) * the heir or devisee to

[Mr. Locke King's act.] 17 & 18 Vict. c. 113. After Dec. 31, 1854, heir or devisee of real estate not to claim payment of mortgage

held that the personal estate was primarily liable. For that if a man borrows money in the name of a trustee, the debt, is, in one way or other, his from the commencement, either to the person who advances the money, or to the trustee in whose name it is borrowed. *Bickham v. Cruttwell*, 3 My. & Cr. 763.

(c) 1 Sugd. V. & P. 310, 10th ed.; [(8th Am. ed.) 195; *Cumberland v. Codrington*, 3 John. Ch. 229.] "I entirely concur," said Sir John Leach M. R. in *Barham v. Lord Thanet*, 3 My. & K. 624, "in the opinions expressed by Lord Alvanley and Sir William Grant, that the purchaser of an estate subject to a mortgage, who has no contract or communication with the mortgagee, and who merely covenants with the vendor to pay the mortgage debt, does not thereby make the mortgage money his personal debt; and that his covenant is to be considered simply as an indemnity to the vendor, who has permitted the amount of the mortgage money to be deducted from the price." A distinction has been made between the case of a man contracting to purchase a mere equity of redemption, and a contract for the purchase of an estate for a given sum, of which the mortgage debt forms part, and which, on the

purchase, is discounted out of the consideration money; in which latter case it has been considered the personal estate of the purchaser will be the primary fund. *Parsons v. Freeman*, Ambl. 116; S. C. 2 P. Wms. 664, note (1); *Belvidere v. Rochfort*, 5 Bro. P. C. 299, Toml. ed. But see *Coote Mortg.* 579, 2d ed.; 2 Jarman on Wills, 605 *et seq.*, 3d ed.

(d) *Waring v. Ward*, 5 Ves. 670; S. C. 7 Ves. 332; *Coote Mortg.* 578, 2d ed. See, also, *Marquis of Bute v. Cunyngham*, 2 Russ. 275. So where A. B. purchased an estate in consideration of an annuity, which was thereupon charged on the purchase, and also upon another estate, and A. B. covenanted to pay it, his personal estate was held primarily liable for the payment. *Yonge v. Furze*, 20 Beav. 380.

(e) See stat. 30 & 31 Vict. c. 69, that a direction for payment of debts out of personalty will not include mortgage debts, unless such intention be expressly implied. As to what shall amount to a signification "of any contrary or other intention," Lord Campbell in *Woolstencroft v. Woolstencroft*, 2 De G., F. & J. 350, expressed his opinion that the same rule should now be observed with respect to exempting the mortgaged land from the payment of the

[1702] [1703]

out of personal assets.

whom such land or hereditaments shall descend or be devised shall not be entitled to have the * mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged

mortgaged money, as was before observed with respect to exempting the personal estate. (See *post*, 1706, 1707.) But this opinion has not been followed. (See 3 Giff. 275; 2 Johns. & H. 198.) And it has been held in several subsequent cases that if there is a specific devise of the mortgaged estate without any mentioning of the mortgaged debt, and there is also a bequest of the personal estate "subject to the payment of all the testator's debts," or the debts are directed to be paid out of it, this is a sufficient indication of intention on the part of the testator that the land should not, under the act, be primarily liable to the payment of the mortgage debt; for, under a direction to pay debts, mortgage debts are included. *Stone v. Parker*, 1 Dr. & Sm. 212; *Smith v. Smith*, 3 Giff. 263; *Mellish v. Vallins*, 2 Johns. & H. 194; *Eno v. Tatham*, 4 Giff. 181; S. C. on appeal, 32 L. J. Ch. 311; [3 De G., J. & Sm. 443;] *Moore v. Moore*, 1 De G., J. & Sm. 603; *Rodhouse v. Mold*, 35 L. J. Ch. 67; [*Rowson v. Harrison*, 31 Beav. 207, appears irreconcilable with these cases.] [A direction to pay all debts, "whether on bond and mortgage or otherwise," is sufficient in New York to exonerate the mortgaged estate. *Waldron v. Waldron*, 4 Bradf. Sur. 144. See *post*, 1704, note (f).] But if the testator directs all his debts to be paid by his executors not out of his personal estate but "out of his estate" generally (which would necessarily include his real estate), this is not a sufficient indication of a "contrary intention." *Woolstencroft v. Woolstencroft*, 2 De G., F. & J. 347, [Am. ed. note (1) and cases cited]; (reversing the decision of the V. C. 2 Giff. 192); *Maxwell v. Hyslop*, L. R. 4 Eq. Cas. 407; *Brownson v. Lawrance*, L. R. 6 Eq. Cas. 1; *Coote v. Lowndes*, L. R. 10 Eq. Cas. 376; [*Taylor v. Wendell*, 4 Bradf. Sur. 330; *Repelye v. Repelye*, 27 Barb. 610;] nor is a direction by the testator, "that all

his just debts shall be paid," without saying that they are to be paid out of his personal estate or by his executors. *Pembroke v. Friend*, 1 Johns. & H. 132. Where the owner of the equity of redemption of two estates comprised in the same mortgage specifically devised one estate, and left the other to pass by a residuary devise, it was held that he thereby signified "a contrary or other intention" within the meaning of the act, so as to make the estate which passed by the residuary devise primarily liable to the whole of the mortgage debt. *Brownson v. Lawrance*, L. R. 6 Eq. Cas. 1. In *Greated v. Greated*, 26 Beav. 621, it was held by Romilly M. R. that inasmuch as there was another fund expressly provided by the testator for payment of the mortgage debts, viz, the residue of the real and personal estate, the act did not apply; but the residue must pay the mortgage debt as directed by the will. See, also, *Allen v. Allen*, 30 Beav. 395; *Newman v. Wilson*, 31 Beav. 33; *Eno v. Tatham*, 32 L. J. Ch. 312, per Lord Justice Turner; [S. C. 3 De G., J. & Sm. 443.] The act applies to equitable mortgages. *Pembroke v. Friend*, 1 Johns. & H. 132; *Coleby v. Coleby*, 12 Jur. N. S. 496. But only where there is a defined and specified charge on a specified estate. *Hepworth v. Hill*, 30 Beav. 476. The act applies to copyholds. *Piper v. Piper*, 1 Johns. & H. 91. It was held in *Dacre v. Patrickson*, 1 Dr. & Sm. 182, in a case where personalty went to the crown, there being no next of kin, that the act applied, and the devisee of a mortgaged estate was not entitled to be exonerated out of the personalty notwithstanding the words of the statute "as between the different persons claiming through or under the deceased person." See, further, as to what is an "interest in land" within the meaning of the statute, *Lewis v. Lewis*, L. R. 13 Eq. Cas. 218.

[1704]

shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof. (*f*) Provided, always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying as aforesaid or otherwise. Provided, also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made, or to be made before Jan. 1, 1855." (*g*)

It frequently occurs that the deceased has devised his real estate for the payment of his debts, or of his debts and legacies, or has charged his real estate with their payment. (*h*) With respect to the exoneration of the real

Exoneration of real estate charged

(*f*) See *Evans v. Wyatt*, 31 Beav. 217. [In New York the payment of the bond of the testator secured by a mortgage of real estate is, by 1 R. S. 749, § 4, primarily charged upon the real estate mortgaged, and cannot be made out of the personal estate, unless by an express provision, or a necessary implication in the will. *Waldron v. Waldron*, 4 Bradf. Sur. 114; *Johnson v. Corbett*, 11 Paige, 265; *House v. House*, 10 Paige, 158. In *Van Vechten v. Keator*, 63 N. Y. 52, it appeared that the will of the testatrix, by its first clause, charged her real estate with the payment of her debts, and empowered her executors to sell so much thereof as should be necessary for that purpose. By the second clause she bequeathed her personal property to S. By the third and last clause she devised all her real estate to her executors in trust for the benefit of S. and her husband for their lives, with remainder over to their children. It was held that the devise was subject to the power in trust vested in the executors by the first clause; that a sale in pursuance thereof operated as a conversion of the realty sold into personalty as to so much of the proceeds as were required for the payment of debts; that the executors could only sell

as such, and for the payment of debts for which resort could be had to them as executors, and for the payment of which, but for the will, the personalty would have been the primary fund; that the executors were not chargeable with the payment of mortgages upon the real estate; and that, therefore, such proceeds could not be applied to the payment of mortgage debts to the prejudice of creditors not secured by mortgage.]

(*g*) The heir of an intestate, who before January 1, 1855, executed a mortgage reserving the equity of redemption to himself and his heirs, is not within this saving clause; for the heir claims by descent and not under any instrument. *Piper v. Piper*, 1 Johns. & H. 91. But a will executed before January 1, 1855, is a will "already made" within the meaning of the clause, notwithstanding the testator died after that day. Nor does a mere republication by codicil, giving no new operation to the material dispositions of the will, deprive it of that character. *Rolfe v. Perry*, 32 L. J. Ch. 471.

(*h*) As to what shall be sufficient to charge the real estate with debts and legacies, see 1 *Rop. Leg.* 571 *et seq.*, 3d ed.; 2 *Pow. Dev.* 644 *et seq.*, *Jarman's ed.*; 2 *Jarman on Wills*, 552, 3d ed. [See *ante*,

with debts and legacies: estate from legacies, the general rule is equally clear, as it is with respect to debts, that the personal estate is the first and natural fund for the payment of them; and the real estate is only *to be resorted to in aid of the personal. Therefore, even in cases where there is no doubt as to debts and legacies being effectually charged by the testator on the real estate, yet the personal estate remains undischarged from its primary liability to those claims. (i)

Accordingly it has long been the settled rule of courts of equity, that the direction of the testator to sell or mortgage his real estate for the payment of his debts and legacies, is not alone evidence of the intention of the testator that the personal estate should be exempt from those charges, and amounts only to a declaration that the real estate shall be so applied to the extent in which the personal estate, which by law is the primary fund, shall be insufficient for those purposes. (k)

Nevertheless, it is clear, that a testator may, if he pleases,

1693, note (l); *Shreve v. Shreve*, 2 Green (N. J.), 487. A devisee of land charged with the payment of a legacy, if he accepts the devise, is liable to a suit for the legacy; and so is his assignee; *post*, 1931, note (k¹); *Cronkhite v. Cronkhite*, 1 N. Y. Sup. Ct. 266, 268, 270. But the devise of a residue imposes no duty on the residuary legatee to pay an annuity not charged on it. *Cronkhite v. Cronkhite*, 1 N. Y. Sup. Ct. 266, 268, 269.]

(i) *Davies v. Ashford*, 15 Sim. 42; *Roberts v. Roberts*, 13 Sim. 336. [The personal estate is not relieved from liability in the first instance, where the legacy is made a charge on real estate, unless such is indicated in the will as the intention of the testator. *Bell C. J. in Perry v. Hale*, 44 N. H. 365; *Hanna's Appeal*, 31 Penn. St. 53; *Glen v. Fisher*, 6 John. Ch. 44; *Adams's Eq.* 263, note; *Paterson v. Scott*, 1 De G., M. & G. 531; *Buckley v. Buckley*, 11 Barb. 77; *Leavitt v. Wooster*, 14 N. H. 550; *Hassanclever v. Tucker*, 2 Binn. 525. Still, disappointed legatees will be entitled to relief against the land charged. *Paterson v. Scott*, 1 De G., M. & G. 531;

Lockwood v. Stockholm, 11 Paige, 87 *Cryder's Appeal*, 11 Penn. St. 72.]

(k) *Rhodes v. Rudge*, 1 Sim. 84, 85; *Walker v. Hardwicke*, 1 My. & K. 396; [*Van Vechten v. Keator*, 63 N. Y. 52. By statute, in Massachusetts, when a testator has given a legacy, which with his debts and the charges of administration, his goods, chattels, rights, and credits, are insufficient to pay, the executor, or the administrator with the will annexed, may be licensed to sell real estate for that purpose, in the same manner and upon the same terms and conditions as are prescribed in the case of a sale for the payment of debts. *Genl. Sts. Mass. c. 102, § 19*; *ante*, 650, note (d¹), 1691, note (h). See *Gibbens v. Curtis*, 8 Gray, 392. This provision is, of course, subject to the rules for the marshalling of assets. See *Ellis v. Page*, 7 Cush. 161; *Hays v. Jackson*, 6 Mass. 151; *ante*, 1693, note (l¹); *post*, 1717, 1718. Lands, specifically devised, are not subject to be sold for the payment of specific legacies. *Ellis v. Page*, 7 Cush. 163; *Hubbell v. Hubbell*, 9 Pick. 561; *ante*, 1693, note (l¹).]

give the personal estate as against his heir or any other real representative, discharged from the payment of his debts and legacies. (*l*) And in such case the rules of exoneration in favor of the heir or the devisee, which have hitherto been the subject of this chapter, altogether fail of application.

A most important question, therefore, arises, viz, what is the mode of expression, on the part of the testator, which will give the personal estate exempt from such payment, in contravention of the ordinary rule that such estate is first liable.

In the earlier cases it was laid down that express words of exemption were necessary. (*m*) But this rule has been relaxed by subsequent decisions; and it is now settled that *the personal fund will be exempted, if the intention of the testator in its favor can be collected from a sound interpretation put upon the whole will; in other words, if there appears from the whole testamentary disposition taken together, an intention on the part of the testator so expressed, as to convince a *judicial* mind, that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal. (*n*)

It is obvious, therefore, that it is impossible to lay down any general rule as a guide upon this question; since the construction of every will, in which the point arises, must depend merely upon the individual circumstances of the particular case; and in these, as in all other cases of inference or implication, except necessary or logical implication, there may be a difference of opinion between the most eminent judges who are called on to consider the circumstances. The difficulty with which the whole subject is surrounded is demonstrated by the following observations of Lord Eldon in *Bootle v. Blundell*. (*o*) "On a comparison of all the cases which have arisen, it is scarcely possible to find any two in which the court altogether agrees with itself; there being scarcely a single circumstance that is considered in one case as a ground of inference in favor of the intention, but it is considered in other cases as against the same inference; and I can find no rule deducible from all that has been said on the subject, but this (which

(*l*) *Ancaster v. Mayer*, 1 Bro. C. C. 462. See *Fisher v. Fisher*, 2 Keen, 610, as to the consequence, in such a case, of a partial failure, by lapse, of the devise of the real estate by the death of one of the devisees in the testator's lifetime.

(*m*) *Fereyes v. Robertson*, Bunb. 302; *Dolman v. Smith*, Prec. Chanc. 458.

(*n*) By Lord Eldon in *Bootle v. Blundell*, 1 Meriv. 230; *Dawes v. Scott*, 5 Russ. 32.

(*o*) 1 Meriv. 219.

appears to be a rule supported by all the cases taken together), namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the will that which is sometimes denominated 'evident demonstration,' sometimes 'plain intention,' and 'necessary implication,' to operate that exemption." (*p*)

In some of the earlier cases, evidence *dehors* the will was *received to show the testator's intention. But on this point, Lord Eldon expressed his clear opinion, in *Boote v. Blundell*, (*q*) that with regard to circumstances *dehors* the will, which have been sometimes called in to assist in explaining it, such as the respective amount of the real and personal estate, the greater or less degree of personal favor which the testator may be presumed to have entertained towards this or that object of his bounty, and others of that nature, they ought all to be set aside in the consideration of a question depending on a will, such question being fit to be decided only by an examination of the whole will taken together. (*r*)

The principle which has the greatest influence on the determination of this question, and which has been uniformly supported by all the cases, is, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts and legacies. The rule of construction is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged. (*s*) In other words, it is not by an intention to charge the real, but by a plain intention to discharge the personal estate, that the question is to be decided. (*t*)

(*p*) See the observations made on this passage by Knight Bruce V. C. in *Collis v. Robins*, 1 De G. & Sm. 141.

(*q*) 1 Meriv. 216.

(*r*) See, also, *Inchiquin v. French*, 1 Cox, 9; *Stephenson v. Heathcote*, 1 Eden, 39; *Andrews v. Emmot*, 2 Bro. C. C. 297; *Standen v. Standen*, 2 Ves. jr. 589; *Coote v. Coote*, 3 Jones & Lat. 175.

(*s*) 1 Meriv. 220.

(*t*) 1 Meriv. 230; *Bickham v. Cruttwell*, 3 My. & Cr. 768; *Collis v. Robins*, 1 De G. & Sm. 131, 141. [The intention of the testator to first charge the realty with the payment of legacies must be either ex-

pressed or clearly implied, not only as an intention to charge realty, but to exonerate personalty. *Whitehead v. Gibbon*, 2 Stockt. Eq. 230; *Kelsey v. Western*, 2 Comst. 506; *Dodge v. Manning*, 1 Comst. 298; *Livingston v. Newkirk*, 3 John. Ch. 325; *Tole v. Hardy*, 6 Cowen, 333; *Allan v. Gott*, L. R. 4 Ch. App. 439; *Kirkpatrick v. Rogers*, 7 Ired. Eq. 44; *McC Campbell v. McC Campbell*, 5 Litt. 98; *Mitchell v. Mitchell*, 3 Md. Ch. 73; *Perry v. Hale*, 44 N. H. 366; *Seaver v. Lewis*, 14 Mass. 83; *Hanna's Appeal*, 31 Penn. St. 57; *Robards v. Wortham*, 2 Dev. Eq. 179; *Palmer v. Armstrong*, 2 Dev. Eq. 268; *Marsh*

Thus it has been held that a mere bequest of residuary personal estate by the term "residue," (*u*) or "*all* my personal estate," (*x*) or a like bequest, after previous sums or articles given out of it, (*y*) or as of personal property "not * otherwise disposed of," (*z*) is not singly sufficient to exempt the personal fund from its natural primary obligation to pay debts and legacies, although the real estate be also subjected to their payment by the will. Again, charging the real estate ever so anxiously for the discharge of debts, will not of itself exempt the personal. (*a*) And whether the whole real estate be charged with debts and legacies, (*b*) or a sufficient part of it, (*c*) or a specific part of it, (*d*) or it be given in trust to pay debts and legacies by sale of it, (*e*) or a term of years be created out of it for those purposes, (*f*) still the personal estate must be *first* applied. Again, neither a devise for payment of debts and legacies out of the rents of real estates, (*g*) nor a devise on condition of the devisee paying the debts, (*h*) nor a mere charge of funeral and testamen-

v. Marsh, 10 B. Mon. 360. It is held sufficient if there appears upon the will a plain intention or necessary implication. *Hoes v. Van Hoesen*, 1 Comst. 120.]

(*u*) *Samwell v. Wake*, 1 Bro. C. C. 144; *Tait v. Lord Northwick*, 4 Ves. 824.

(*x*) *Harewood v. Child*, cited Cas. temp. Talb. 204; *Haslewood v. Pope*, 3 P. Wms. 324; *Brummel v. Prothero*, 3 Ves. 111; *Aldridge v. Wallscourt*, 1 Ball & Beat. 312. But see *post*, 1710.

(*y*) *Brydges v. Phillips*, 6 Ves. 567.

(*z*) *Hartley v. Hurle*, 5 Ves. 540.

(*a*) By Lord Loughborough in *Tait v. Northwick*, 4 Ves. 824; [*Livingston v. Newkirk*, 3 John. Ch. 319.]

(*b*) *Dolman v. Smith*, Prec. Chanc. 456.

(*c*) *Inchiquin v. French*, Ambl. 33, 37; S. C. 1 Cox, 1; *Rhodes v. Rudge*, 1 Sim. 79.

(*d*) *White v. White*, 2 Vern. 43; *Bridgman v. Dove*, 3 Atk. 201; *Fitzgerald v. Field*, 1 Russ. C. C. 428.

(*e*) *Inchiquin v. French*, 1 Cox, 1; S. C. Ambl. 33; *Hancox v. Abbey*, 11 Ves. 186.

(*f*) *Tower v. Rous*, 18 Ves. 132.

(*g*) *Hartley v. Hurle*, 5 Ves. 540.

(*h*) *Bridgman v. Dove*, 3 Atk. 201.

["But this would seem to be one of the circumstances to be weighed with others in the will, as indicating the intention of the testator. An absolute and specific disposition of all the personal estate of the testator, not a mere residuary bequest, is sufficient to manifest the intention of the testator to charge the realty in exoneration of the personalty. *Kelley v. Deyo*, 3 Cowen, 133. From the principle that the personal estate is the fund first liable to the payment of legacies, it results that where the personal estate is not intended to be exonerated, the receipt by the executor of personal assets, sufficient to pay the legacies, discharges the real estate from any further liability for the payment of them; and where such assets are wasted or misapplied by the executor, the loss falls upon the legatee; and he cannot resort to the real estate, upon which the legacy is charged, either in the hands of the devisee or of any purchaser from him. *Sims v. Sims*, 2 Stockt. (N. J.) 168; *Glen v. Fisher*, 6 John. Ch. 34; *Birdsall v. Hewlett*, 1 Paige, 32." *Bell C. J. in Perry v. Hale*, 44 N. H. 366.]

tary expenses, as well as debts, on the land, (i) nor an express charge of only *some* of the debts upon the *personalty*, (k) will exempt the personal fund from its legal primary liability. (l)

A very strong inference against the claim of exemption of the personal estate appears to be the circumstance of its falling to the executor for his benefit *virtute officii*, (m) prior to the statute 1 W. 4, c. 40, (n) or in an instance of the *gift of the personal estate to the executor as a legacy, and the appointment of him to be executor, being in one and the same sentence; (o) but the converse of the proposition above stated, i. e. the gift of the legacy, and the appointment of the legatee to be executor, being in distinct sentences, will not of itself afford an inference for the exemption of the personal estate. Cases are, however, to be found, in which the executor has been held to take the personal estate, or residue of a personal estate, as a specific legacy, exempt from the payment of debts. (p)

Again, the circumstance of the *same persons* being appointed trustees and executors, has had considerable weight in inducing judges to draw an inference, that the personal estate is not to be exempted; (q) and Lord Alvanley has remarked, (r) that the circumstance of the trustees not being the executors affords a strong inference as to the real intention, and is always favorable to the exemption of the personal estate. (s)

It has been already stated that a *mere charge* of funeral expenses upon the real estate will not exempt the personal fund from its primary liability to debts, &c. However, such a charge, in concurrence *with other circumstances*, has, in some cases, had importance attached to it, in exempting the personal estate from debts, &c. upon the reasoning, that, as funeral expenses primarily attach themselves to the personal fund in the hands of executors, the testator, by transferring that duty from them to the

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| (i) Walker v. Jackson, 2 Atk. 626; | (n) See ante, 1475. |
| Stephenson v. Heathcote, 1 Eden, 38; | (o) Broomhall v. Wilbraham, Cas. |
| Brydges v. Phillips, 6 Ves. 570. See, also, | temp. Talb. 274; Rhodes v. Rudge, 1 |
| Gray v. Minnethorpe, 3 Ves. 103; Hart- | Sim. 79; Coote Mortg. 548, 2d ed. |
| ley v. Hurle, 5 Ves. 540; M'Clelland v. | (p) Hall v. Brooker, Gilb. Eq. Rep. 73; |
| Shaw, 2 Sch. & Lef. 538; Bootle v. Blun- | Coote Mortg. 548, 2d ed. |
| dell, 1 Meriv. 228, 229. But see post, 1709. | (q) Dolman v. Smith, Prec. Chanc. |
| (k) Watson v. Brickwood, 9 Ves. 447. | 456; Coote Mortg. 549, 2d ed. |
| (l) 1 Rep. Leg. 609, 3d ed. | (r) Burton v. Knowlton, 3 Ves. 108. |
| (m) Gray v. Minnethorpe, 3 Ves. 106; | (s) Coote Mortg. 549, 2d ed. |
| Coote Mortg. 547, 2d ed. | |

trustees of the real estate, must have intended to give the whole of the personalty to the legatee, specifically discharged from every obligation to which it was naturally liable. (*t*) On the other hand, in some *instances, the omission to charge funeral expenses on the real estate has been considered a circumstance of some weight to show that the personal estate is not to be exempt, because it shows that the testator intends the personal estate to be charged beyond the particular legacies or charges mentioned in the will, and being once broken in upon, the argument of its being specific is destroyed. (*u*)

Again, there has been occasion to state that the personalty is not exempted by the facts of the debts, &c. being charged upon the real estate, and a mere concomitant bequest of *all* the personal estate. (*x*) However, in several instances, the circumstance of such a bequest, as distinguished from a gift of the *residue*, has been treated as having weight. (*y*)

The limits of this treatise will not allow that the different instances, in which the intention of the testator in favor of the exemption of the personal estate has been established, should be stated at large. The principal decisions of that nature will be found collected in the note below, (*z*) and the *attention of the

(*t*) *Burton v. Knowlton*, 3 Ves. 108. See, also, *Greene v. Greene*, 4 Madd. 157; *Michell v. Michell*, 5 Madd. 69.

(*u*) *Brydges v. Phillips*, 6 Ves. 570; *Cootes Mortg.* 551, 2d ed.

(*x*) *Ante*, 1707.

(*y*) *Tower v. Rous*, 18 Ves. 139; *Boottle v. Blundell*, 1 Meriv. 228; *Greene v. Greene*, 4 Madd. 148; *Michell v. Michell*, 5 Madd. 69; *Gilbertson v. Gilbertson*, 34 Beav. 354. [Where the testator bequeathed his personal property, not by a residuary clause, but by an absolute bequest, and devised property in trust to his executors, and directed them, out of the proceeds, to pay his debts, it was held that this manifested a clear intention of the testator to give the personal property to the legatee, his wife, exempt from the liability to pay his debts. *Lee*, appellant, 18 Pick. 285. See, also, *Bardwell v. Bardwell*, 10 Pick. 19; *Wallace v. Wallace*, 23 N. H. 149. In *Lee*, appellant, *supra*, Shaw C.J. said: "When it appears to have been the in-

tention of the testator to provide for the payment of debts by a sale of real estate, and not merely by a general charge of debts on the real estate, there the proceeds of such real estate shall be first applied." "The only question then is, whether descended real estate shall go for the payment of debts before personal estate absolutely bequeathed, and intended to be exempt from the payment; and the court are of opinion that the descended real estate should be first applied. *Livingston v. Newkirk*, 3 John. Ch. 319." See *ante*, 1693, note (*l*).]

(*z*) *Waise v. Whitfield*, 8 Vin. Abr. 437, tit. Devise, Z. d. pl. 19; *Adams v. Meyrick*, 1 Eq. Cas. Abr. 271, pl. 13; *March v. Fowke*, Finch Rep. 414; *Wainwright v. Bendlowes*, 2 Vern. 718; S. C. Prec. Chanc. 451; *Anderton v. Cooke*, cited 1 Bro. C. C. 457; *Bamfield v. Wyndham*, Prec. Chanc. 101; *Bicknel v. Page*, 2 Atk. 79; *Kynaston v. Kynaston*, 1 Bro. C. C. 457, *in notis*; *Holliday v. Bowman*,

reader is particularly directed to the case of *Bootle v. Blundell*, (*a*) in which almost every circumstance occurred which had been the subject of judicial observations in preceding cases, and upon which different judges had formed different opinions as to their effect singly to exonerate the personal estate; and Lord Eldon, after going through a review of those cases, and making full observations upon every part of the will, determined that the personal estate was exonerated from the primary liability to pay debts.

It is necessary, before leaving this subject, to advert to a distinction which exists with respect to it, between debts and legacies. It has already appeared, that a pecuniary legacy, given generally, without specification of a particular fund for its payment, is primarily chargeable upon the personal estate, although in other parts of the will, the real estate is made expressly liable to it; the rule of law considering the personal estate as the natural fund to bear such a charge. (*b*) But if the pecuniary legacy be not given generally, but given only out of a particular fund, there the legatee can have recourse only to the particular fund; (*c*) and in this * there is an essential difference between debts and legacies. (*d*)

cited 1 Bro. C. C. 145; *Gaskill v. Hough*, cited 31 Ves. 110; *Atty. Gen. v. Barkham*, cited Cas. temp. Talb. 206; *Stapleton v. Colville*, Cas. temp. Talb. 202; *Phipps v. Annesley*, 2 Atk. 57; *Walker v. Jackson*, 2 Atk. 624; S. C. 1 Wils. 24; *Williams v. Bishop of Llandaff*, 1 Cox, 254; *Webb v. Jones*, 1 Cox, 245; S. C. 2 Bro. C. C. 60; *Burton v. Knowlton*, 3 Ves. 107; *Hancox v. Abbey*, 11 Ves. 179; *Bootle v. Blundell*, 1 Meriv. 193; *Gittins v. Steele*, 4 Swanst. 24; *Greene v. Greene*, 4 Madd. 148; *Michell v. Michell*, 5 Madd. 69; *Noel v. Noel*, 12 Price, 213; *Welby v. Rockcliffe*, 1 Russ. & My. 571; *Driver v. Ferrand*, Ib. 681; *Clutterbuck v. Clutterbuck*, 1 My. & K. 15; *Blount v. Hipkins*, 7 Sim. 43; *Vandeleur v. Vandeleur*, 9 Bligh, 157; [S. C. 3 Cl. & Fin. 82;] *Jones v. Bruce*, 11 Sim. 221. And see the cases stated 1 Rop. Leg. 610 *et seq.*, 3d ed.; 2 Pow. Dev. 681, *et seq.*, Jarman's ed.; *Coote Mortg.* 544 *et seq.*, 2d ed.; 2 Jarm. Dev. 613 *et seq.*, 3d ed.; *Ashby v. Ashby*, 1 Coll. 549; *Bateman v. Roden*, 1 Jones &

Lat. 356; *Lamphier v. Despard*, 2 Dr. & W. 59; *Coote v. Coote*, 3 Jones & Lat. 175; *Collis v. Robins*, 1 De G. & Sm. 131; *Ouseley v. Anstruther*, 10 Beav. 453; *Lomax v. Lomax*, 12 Beav. 285; *Quennell v. Turner*, 13 Beav. 240; *Woodhead v. Turner*, 4 De G. & Sm. 429; *Evans v. Evans*, 17 Sim. 102; *Whieldon v. Spode*, 15 Beav. 537; *Plenty v. West*, 16 Beav. 173; *Forrest v. Prescott*, L. R. 10 Eq. Cas. 545.

(*a*) 1 Meriv. 193.

(*b*) *Ante*, 1704, 1707.

(*c*) *Kirke v. Kirke*, 4 Russ. 435, 449; [*Walls v. Stewart*, 16 Penn. St. 275, 288, and cases cited.] See *Spurway v. Glynn*, 9 Ves. 483; *Hancox v. Abbey*, 11 Ves. 179; *Gittins v. Steele*, 1 Swanst. 24; *Rickets v. Ladley*, 3 Russ. 418; *Roberts v. Roberts*, 13 Sim. 336; *Dickin v. Edwards*, 4 Hare, 273, 276; *Fream v. Dowling*, 20 Beav. 624. But see, also, *Mann v. Copeland*, and the other cases cited, *ante*, 1170. See, further, *Colville v. Middleton*, 3 Beav. 570.

(*d*) 4 Russ. 449. See *Noel v. Lord*

Further, it may be stated as a rule, that where a testator gives a certain portion of his personal estate and expressly directs that it shall be liable and applicable to the payment of his debts, it is an exoneration of the general personal estate. (*e*)

exoneration of the general personal estate.

Where the testator directs a sale of his real estate, and the proceeds and the personal estate are thrown into one mass, which he subjects to the payment of debts and legacies, the real and the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts and legacies. (*f*) But this rule is not applicable where the real and personal estate are not thrown into one mass, notwithstanding they are both given to the same persons, in trust therewith to pay debts and legacies; for in such case each fund retains its original character and its original liabilities. (*g*) In order that the rule should apply there must be a direction for the sale of the real estate.

Mixed fund of real and personal estate in one mass directed to be applied to payment of debts and legacies:

Henley, 7 Price, 241; S. C. Daniell, 211; S. C. in Dom. Proc. 12 Price, 213, *nomine* Noel v. Noel.

(*e*) Webb v. De Beauvoisin, 31 Beav. 576; Vernon v. Manvers, 31 Beav. 623; Coventry v. Coventry, 2 Dr. & Sm. 470.

(*f*) Roberts v. Walker, 1 Russ. & My. 572; Dunk v. Fenner, 2 Russ. & My. 557; Fourdrin v. Gowdey, 3 My. & K. 383; Stocker v. Harbin, 3 Beav. 479; Salt v. Chattaway, 3 Beav. 576; West v. Cole, 4 Y. & Coll. 460; Young v. Hassard, 1 Jones & Lat. 466; Barry v. Harding, Ib. 475; Atty. Gen. v. Southgate, 12 Sim. 77; Shallcross v. Wright, 12 Beav. 505; Robinson v. Governors of London Hospital, 10 Hare, 19. See, also, Falkner v. Grace, 9 Hare, 282; Lord v. Wightwick, 1 Drew. 576; Tatlock v. Jenkins, Kay, 654; Bentley v. Oldfield, 19 Beav. 225, 228; Simmons v. Rose, 21 Beav. 37; 6 De G., M. & G. 411; [Elliott v. Carter, 9 Grattan, 541; Hubbard J. in Adams v. Brackett, 5 Met. 280, 282; Hassanclever v. Tucker, 2 Binn. 525; Witman v. Norton, 6 Binn. 395; Cox v. Corkendall, 2 Beasley (N. J.), 138; Ford v. Gaithur, 2 Rich. Eq. 270; 2 Jarman Wills (3d Eng. ed.) 592. If legacies are given generally, and the residue

of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real as well as the personal estate. Greville v. Brown, 7 H. L. Cas. 689; Wheeler v. Howell, 3 Kay & J. 198; Gyett v. Williams, 2 Johns. & H. 429; In re Brooke, Brooke v. Brooke, 3 Ch. Div. 630; Hays v. Jackson, 6 Mass. 149; Wilcox v. Wilcox, 13 Allen, 252; Robinson v. McIver, 63 N. Car. 649; Johnson v. Farrell, 64 N. Car. 268; Lewis v. Darling, 16 How. (U. S.) 10; Gallagher's Appeal, 48 Penn. St. 122; Moore v. Beckwith, 14 Ohio St. 135. As to the degree of assent given to this rule in Connecticut, see Gridley v. Andrews, 8 Conn. 1. In New York, see Myers v. Eddy, 47 Barb. 264; Lupton v. Lupton, 2 John. Ch. 614; Shulters v. Johnson, 38 Barb. 80. In New Jersey, see Van Winkle v. Van Houten, 2 Green Ch. 172; Dey v. Dey, 4 C. E. Green, 137. In South Carolina, see Laurens v. Read, 14 Rich. Eq. 245.]

(*g*) Boughton v. Boughton, 1 H. L. Cas. 406; Blann v. Bell, 5 De G. & Sm. 658; Tidd v. Lister, 3 De G., M. & G. 857; Tench v. Cheese, 6 De G., M. & G. 453. [See Lewis v. Darling, 16 How. (U. S.) 10; Buckley v. Buckley, 11 Barb. 43;

It may here be mentioned that where there is a specific devise or a specific legacy, the presumption is that the testator intended that the devisee or legatee should have it in its integrity. Therefore a general charge of particular legacies * on the whole real and personal estate will not be allowed to operate as a charge in derogation of such specific devises or legacies. (*h*)

The expression in a will, "all my just debts," includes all the testator's debts whenever and wherever contracted, and therefore includes a debt contracted by him after the making of the will, and contracted in a country other than that of his domicil, and secured upon property in that country. (*i*)

"All my just debts," meaning of.

SECTION II.

Of Marshalling the Assets in Favor of Creditors and Legatees.

It is a general principle of equity, that if a claimant has two funds to which he may resort, a person having an interest in one only has a right to compel the former to resort to the other; if that is necessary for the satisfaction of both. (*j*) This principle is not confined to the administration of the estate of a person deceased, but applies wherever the election of a party having two funds will disappoint the claimant having the single fund. And accordingly, a court of equity will, if necessary, control that election, and compel the one to resort to that fund which the other cannot reach. (*k*) But the more general practice is, to protect the claimant on the single fund by marshalling the assets.

Thus, if the deceased died before the passing of the stat. 3 & 4 W. 4, c. 104, (*l*) *i. e.* before the 29th of August, 1833, and there were creditors of the deceased by specialty, and creditors by simple contract, and the specialty creditors, instead

In favor of creditors.

Hassanclever *v.* Tucker, 2 Binn. 525; 11 Hare, 93; Legh *v.* Legh, 15 Sim. 135; Clery's Appeal, 35 Penn. St. 54.]

(*h*) Spong *v.* Spong, 1 Dow & Cl. 365; Seagrim, 20 Beav. 614; South *v.* Bloxham, 2 Hemm. & M. 457; [Rice *v.* Harbison, 63 N. Y. 493, 498.]

(*i*) Maxwell *v.* Maxwell, L. R. 4 H. L. 506.

(*k*) See Fonbl. Treat. Eq. bk. 3, c. 2, s. 6, note (*i*).

(*j*) 8 Ves. 388; Tidd *v.* Lister, 3 De G., M. & G. 857, 872; Haynes *v.* Forshaw,

(*l*) See *ante*, 1691.

of resorting to the real assets, which they alone could * reach, proceeded against the personal estate, to the exclusion of the simple contract creditors, who had no other fund, a court of equity would marshal the assets by permitting the simple contract creditors to stand in the place of the specialty creditors against the real assets, so far as the latter should have exhausted the personal. (*m*) And the rule was the same with respect to real assets devised as those descended. (*n*)

So, in a modern case, (*o*) the testator died seised of freehold and copyhold estate, both of which were subject to mortgage. The personal estate was exhausted in payment of the mortgage and of two bonds upon which the testator was indebted to the mortgagee. And Lord Eldon held that the simple contract creditors were entitled to stand in the place of the mortgagee *pro tanto*, against both the freehold and copyhold estate. So, in another case, (*p*) the specialty creditors of a deceased mortgagor of copyhold and freehold estate were allowed to stand in the place of the mortgagee against the copyholds, to the extent of the sum which the mortgagee had received from the freehold estate. (*q*)

* Again, if the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate. (*r*)

It may here be observed, that in *Greenwood v. Taylor*, (*s*) Sir

(*m*) But they shall not stand in the place of the specialty creditors as to the interest which would have accrued on the specialty debts if they had remained unsatisfied. *Cradock v. Piper*, 15 Sim. 301.

(*n*) *Sagitary v. Hyde*, 1 Vern. 455; *Neave v. Alderton*, 1 Eq. Cas. Abr. 144, pl. 21; *Wilson v. Fielding*, 2 Vern. 763; *Galton v. Hancock*, 2 Atk. 436; *Selby v. Selby*, 4 Russ. 341. So covenantees, who claim under a merely voluntary covenant, have been held entitled, as against devisees, to stand in the place of mortgagees, who have exhausted the fund provided by the testator for the payment of debts. *Lomas v. Wright*, 2 My. & K. 769; *Hales v. Cox*, 32 Beav. 118. But the assets

shall not be marshalled against judgment creditors. *Sharpe v. Lord Scarborough*, 4 Ves. 538.

(*o*) *Aldrich v. Cooper*, 8 Ves. 381, overruling *Robinson v. Tonge*, 1 P. Wms. 679, note.

(*p*) *Gwynne v. Edwards*, 2 Russ. 289, *in notis*.

(*q*) The specialty creditors could not otherwise have reached the copyhold, for copyhold estates, previous to the passing of the stat. 3 & 4 W. 4, c. 104 (see *ante*, 1691), were not liable, either at law or equity to the testator's debts, further than he had subjected them thereto.

(*r*) *Selby v. Selby*, 4 Russ. 336.

(*s*) 1 Russ. & My. 185.

[1714] [1715]

John Leach M. R. appears to have considered that this principle of equity extends to the case of a specialty creditor, whose debt is also secured by a mortgage, so as to preclude him from proving under a decree in a creditor's suit for the full amount of his debt, but only for so much as the mortgaged estate will not extend to pay. In that case a mortgagee petitioned for the sale of his security, and to be permitted to prove the full amount of his debt, in a suit for the administration of the assets of the deceased mortgagor. But the learned judge held that the rule in bankruptcy must be applied, (*t*) and that the mortgagee, who had two funds, as against the other specialty creditors who had but one fund, must resort first to the mortgage security, and could claim against the common fund only what the mortgaged estate was deficient to pay. However, in *Mason v. Bogg*, (*u*) Lord Cottenham appeared to doubt the propriety of this decision. And his lordship observed, that as a mortgagee has a double security, he has a right to proceed against both, and to make the best he can of both; and that it is not easy to see why he should be deprived of this right, because the debtor dies, and dies insolvent. (*v*)

* A similar equity will be extended in favor of legatees. Thus, where a specialty creditor, who has a general lien on the real estate, as a creditor by bond in which the deceased bound himself and his heirs, receives satisfaction out of the per-

(*t*) In bankruptcy, if a creditor of a bankrupt holds security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realizing his security. See 1 Phill. C. C. 56, *In re Plummer*. See, also, 32 & 33 Vict. c. 71, s. 40.

(*u*) 2 My. & Cr. 443.

(*v*) See, also, *Davis v. Dowding*, 2 Keen, 245; *Tipping v. Power*, 1 Hare, 410; *Brocklehurst v. Jessop*, 7 Sim. 438; *King v. Smith*, 2 Hare, 239; *Greenwood v. Firth*, 2 Hare, 241, note; *Aldridge v. Westbrook*, 5 Beav. 193; *Bonser v. Cox*, 6 Beav. 84; *Marshall v. M'Aravey*, 3 Dr. & W. 232; *Cockrell v. Dickens*, 3 Moore Priv. C. 98; *Lockhart v. Hardy*, 9 Beav. 349. In *Rome v. Young*, 3 Y. & Coll. 199, a vendor of an estate had obtained a decree for specific performance, with a declaration that, if the purchase-money was

not paid by a given day, the estate should be sold, the proceeds paid to the vendor, and the purchaser be made personally liable in the event of any deficiency. The master fixed the day of payment, but the purchaser died before that day insolvent, and a creditor's suit was instituted for the administration of his assets. Upon a bill of revivor and supplement filed by the vendor, praying to have the benefit of the creditor's suit as well as his own, Lord Abinger held that he was not entitled to prove against the general assets of the testator, and at the same time to reserve his lien on the estate contracted to be sold, in case of a deficiency in the general assets. And his lordship added that, although he agreed with what Lord Cottenham said in *Mason v. Bogg*, he did not see how it applied to the present case. See, also, *S. C.* 4 Y. & Coll. 204, accord.

sonal estate, and thereby exhausts it so as to leave nothing for the payment of legacies, a legatee shall stand in the place of such specialty creditor as against the real assets which have *descended* to the heir. (*w*) “In the case of legatees,” said Lord Eldon, in *Aldrich v. Cooper*, (*x*) “against assets, descended, a legatee has not so strong a claim to this species of equity as a creditor; but the mere bounty of the testator enables the legatees to call for this species of marshalling; that if those creditors, having a right to go to the real estate descended, will go to the personal estate, the * choice of the creditors shall not determine whether the legatees shall be paid or not.”

And on the same principle it seems to be clear, that if, since the passing of the stat. 3 & 4 W. 4, c. 104, (*y*) by which the real estate is made liable to simple contract debts, a simple contract creditor should receive satisfaction out of the personal estate and thereby exhaust it, the legatees would be allowed to stand in his place against the real assets which have descended.

But where the real estate does not descend to the heir, but is *devised* to a stranger, or to the heir taking as devisee, (*z*) the assets are not marshalled in favor of general legatees, so as to

(*w*) *Bowaman v. Reeve*, Prec. Chanc. 578; *Lutkins v. Leigh*, Cas. temp. Talb. 54; *Hanby v. Roberts*, Ambl. 128; S. C. Dick. 105.

(*x*) 8 Ves. 396. Therefore, where the executor of a testator is a mortgagee of the real estate, as to which there was an intestacy, and also a legatee under his will, he is not bound to satisfy the mortgage debt out of the first sufficient sum of personal assets that comes to his hands, the reason being that if he were compelled to do so, and thus to exhaust the personal estate, he would be entitled to come against the real estate to the extent to which the legacy remained unsatisfied. *Binns v. Nicholls*, L. R. 2 Eq. 256.

(*y*) *Ante*, 1696.

(*z*) See the MSS. note of Serjeant Hill, in Blunt's edition of Ambler, 383, on the question whether a devise of land to the heir, which is void as to passing the estate, shall not exempt the lands from the legatees' right to stand in the place of specialty creditors. It has been held by

Sir L. Shadwell V. C. that since the stat. 3 & 4 W. 4, c. 106 (*Act for the amendment of the law of inheritance*), wherever there is a devise to the heir, he must be considered, to all intents and purposes, as taking by devise and not by descent, for the third section of that statute (whereby it is provided that when any land shall have been devised by any testator, who shall die after December 31, 1833, to his heir, such heir shall be considered to have acquired the land as devisee and not by descent) is not to be considered as relating exclusively to the law of inheritance, but has also application with regard to assets. *Strickland v. Strickland*, 10 Sim. 374. And even in cases where the testator died before December 31, 1833, so as not to be within the operation of this act, the estates devised to the heir are not, in equity, to be applied to the payment of the testator's debts, in priority to other parts of his estate devised to other persons. *Bierderman v. Seymour*, 3 Beav. 368.

throw the creditors on the real assets *devised*. (a) And this rule is not confined to specific devises of land, but extends to lands which pass under a residuary devise. (b) If, indeed, the lands devised are *charged with* * debts, the assets will be marshalled; for

(a) *Clifton v. Burt*, 1 P. Wms. 678; *Scott v. Scott*, Ambl. 383; S. C. 1 Eden, 458; *Hanby v. Fisher*, Dick. 105; S. C. Ambl. 128; *Keeling v. Brown*, 5 Ves. 359; *Aldrich v. Cooper*, 8 Ves. 397; [In *Farquharson v. Floyer*, 3 Ch. Div. 109, it was held that where there is a bequest of pecuniary legacies, and devises of real and residuary real estates, and an insufficient amount of personalty for the payment of debts, the pecuniary legacies must be first resorted to to make up the deficiency. The cases of *Collins v. Lewis*, L. R. 8 Eq. 708; *Dugdale v. Dugdale*, L. R. 14 Eq. 234; and *Tomkins v. Colthrust*, 1 Ch. Div. 626, were followed in the above decision, and the case of *Hensman v. Fryer*, L. R. 3 Ch. App. 420, cited in note (b) below, was not followed. A testator gave a specific, and several general legacies, and devised his farm, being all his real estate, to several of his children, and afterwards, by a general clause, made the same children residuary legatees and devisees; his personal property was not sufficient to pay his debts and the specific legacy; it was held that the general legatees must lose their legacies, and that the real estate, being specifically devised, could not be sold to pay them. *Humes v. Wood*, 8 Pick. 478; *Wallace v. Wallace*, 23 N. H. 155.]

(b) *Mirehouse v. Scaife*, 2 My. & Cr. 695. But if the cases are to be supported in which it has been held that a residuary devise, since the new wills act (1 Vict. c. 26) is not specific (see *ante*, 1696, note (c)), it should seem that in respect of wills made after that act came into operation, the law is altered, and general legatees are entitled to have the assets marshalled against residuary devisees. But see *Hensman v. Fryer*, L. R. 3 Ch. App. 420; and see *ante*, 1696, note (c). [It was decided in New Jersey, in the case of

Corwine v. Corwine, 9 C. E. Green, 579, that if legacies are given generally, and the residue of the real and personal estate is afterwards given in one mass, the legacies are a charge on the residuary real as well as personal estate. In this case it appeared that a testator, having first directed his debts to be paid, gave a money legacy to each of his two daughters, and a specific legacy of household goods to his said daughters and his son C., equally. His will then proceeded: "I give and bequeath to my son C. the entire residue of my estate, both real and personal, not otherwise disposed of, to him, his heirs and assigns." The personal estate being insufficient to pay the two pecuniary legacies alone, they were a charge on the testator's real estate. In accord with this decision are *Van Winkle v. Van Houten*, 2 Green Ch. 172; *Dey v. Dey*, 4 C. E. Green, 137; *Wilcox v. Wilcox*, 13 Allen, 252; *Blaney v. Blaney*, 1 Cush. 107; *Hays v. Jackson*, 6 Mass. 149; *Witman v. Norton*, 6 Binn. 395; *Gallagher's Appeal*, 48 Penn. St. 122; *Robinson v. McIver*, 63 N. Car. 649; *Johnson v. Farrell*, 64 N. Car. 268; *Moore v. Beckwith*, 14 Ohio St. 135; *Greville v. Browne*, 7 H. L. Cas. 689; *Wheeler v. Howell*, 3 Kay & J. 198; *Gyett v. Williams*, 2 Johns. & H. 429; *Hassell v. Hassell*, 2 Dick. 527; *Cole v. Turner*, 4 Russ. 376; *Francis v. Clemow*, Kay, 435; *Bench v. Biles*, 4 Madd. 187; *Adams v. Brackett*, 5 Met. 280, 282; *Lewis v. Darling*, 16 How. (U. S.) 10, 11, and cases cited. As to Connecticut, see *Gridley v. Andrews*, 8 Conn. 1. As to New York, see *Lupton v. Lupton*, 2 John. Ch. 614; *Myers v. Eddy*, 47 Barb. 264; *Church v. Wachter*, 42 Barb. 43; *Sutters v. Johnson*, 38 Barb. 80; *McLaughlin v. McLaughlin*, 30 Barb. 459. See *Laurens v. Read*, 14 Rich. Eq. 245.]

lands so charged are applicable to the payment of debts before general pecuniary legacies. (c)

With respect to specific legatees, the assets shall be so far marshalled against the specific devisees of real estate, upon failure of the general personal estate, that the devisee and specific legatee shall each, in proportion to their respective gifts, *contribute* to the payment of the specialty debt. (d)

It must, likewise, be observed, that if a creditor has a specific lien on the real estate, and resorts to the personal, the assets will be marshalled in favor of general legatees, as well against real assets devised as descended. Thus it is now fully settled, that if the real estate subject to a mortgage be devised, and the mortgagee exhaust the personal assets, a pecuniary legatee shall stand in the place of the mortgagee upon the devised estate. (e) It seems, therefore, *that although, generally speaking (as there has

(c) *Foster v. Cook*, 3 Bro. C. C. 347; *Paterson v. Scott*, 2 De G., M. & G. 531; *Surtees v. Pakin*, 19 Beav. 406. The law on this subject is not affected by the stat. 3 & 4 W. 4, c. 104; *Rickard v. Barrett*, 3 Kay & J. 289.

(d) *Long v. Short*, 1 P. Wms. 403; *Tombs v. Roch*, 2 Coll. 490; *Gervis v. Gervis*, 14 Sim. 654; [*ante*, 1693, note (lⁱ); 1705, note (k); *Hubbell v. Hubbell*, 9 Pick. 561, *Hume v. Wood*, 8 Pick. 478, *ante*, 1717, note (a). In *Hayes v. Seaver*, 7 Greenl. 239, Parris J. said: "It is a familiar principle that specific legatees, although bound, under certain circumstances, to contribute towards the payment of debts, are not bound to contribute toward the payment of other legacies." But where a testator directed all his debts, in the first place, to be paid out of his personal estate, except his leaseholds, if sufficient, and if not, he charged his real estate therewith, it was held by Lord Langdale that the specific legacies were liable to the payment of the debts in priority of the real estate. *Bateman v. Hotchkins*, 10 Beav. 426. [By statute, in Massachusetts, when any estate, real or personal, that is devised, is taken from the devisee for the payment of the debts of the testator, all the other devisees and legatees must con-

tribute their respective proportions of the loss to the person from whom the estate is taken, so that the loss shall fall equally on all the devisees and legatees, according to the value of the property received by each, unless an express or implied exemption, or a different appropriation, is made by the will. Genl. Sts. c. 92, §§ 29, 30, 31, 32, 33.]

(e) *Lutkins v. Leigh*, Cas. temp. Talb. 54; *Forrester v. Leigh*, Ambl. 172; *Selby v. Selby*, 4 Russ. 341; *Wythe v. Henniker*, 2 My. & K. 635; *ante*, 1694, note (r); 15 Beav. 453, by Romilly M. R. But where a testator devised his E. estate, *subject to his debts*, to his wife for life, with remainders over, and devised his C. estate, *subject to his debts*, to his wife absolutely; and he afterwards mortgaged his E. estate, Romilly M. R. held that on a deficiency of the personal estate, the estates E. and C. ought to contribute ratably towards payment of the mortgage; for that the testator's intention was apparent that the real estate must bear the expense of paying all the debts, whether simple contract, or charged on any particular portion of the real estate. *Middleton v. Middleton*, 15 Beav. 450. [See *Gibson v. McCormick*, 10 Gill & J. 65; *Mason's Estate*, 1 Parsons Eq. 129.]

already been occasion to show), (*f*) a testator, by devising land expressly "subject to a mortgage," does not thereby declare any intention that the devisee shall take *cum onere*, as against the testator's personal estate, yet the court does discover such an intention if his personal estate be insufficient for the payment of his debts and legacies. (*g*)

Whether the law is the same with respect to an equitable lien, such as a vendor has upon the purchased estate for the purchase-money unpaid, is a question which has been much discussed. (*h*) It has already appeared that it has been decided in favor of a *creditor*, that simple contract creditors are entitled to stand in the place of the vendor against the devisees of the land subject to the equitable lien. And in *Selby v. Selby*, (*i*) Sir John Leach M. R. seemed to be of opinion that a pecuniary legatee had a right to the same benefit; and that no good reason could be assigned why, in this case alone, an exception is to be made to the equitable rule on which the marshalling of assets rests, that he who has power to resort to two funds shall not, by his election, altogether disappoint another person who has power to resort to one fund only. (*j*) But in the subsequent case of *Wythe v. Henniker*, (*k*) the same learned judge decided against the right of pecuniary legatees to stand in the place of the vendor upon the land *devised*, his honor at the same time expressing an opinion, that if the estate purchased had *descended* they would have been so entitled. And, accordingly, in the subsequent case of *Sproule v. Prior*, (*l*) where the purchased estate had *descended*, Sir L. Shadwell V. C., after reviewing all the previous cases, ordered the assets to be marshalled in favor of a pecuniary legatee. In the *subsequent case of *Birds v. Askey*, (*m*) Romilly M. R. appears to have disregarded the decision in *Wythe v. Henniker*, and to have followed *Sproule v. Prior*, even in a case where the purchased estate had been *devised*. (*n*)

(*f*) *Ante*, 1694, note (*r*).

(*g*) 4 Hare, 94.

(*h*) See 2 Sugden V. & P. 67 *et seq.*, 9th ed.

(*i*) 4 Russ. 340.

(*j*) The principal cases on this point are *Pollexfen v. Moore*, 3 Atk. 272; *Coppin v. Coppin*, 2 P. Wms. 295; *Austen v. Halsey*, 6 Ves. 475; *Trimmer v. Bayne*, 9

Ves. 209; *Mackreth v. Symmons*, 15 Ves. 344; *Headley v. Redhead*, Cooper, 50.

(*k*) 2 My. & K. 635.

(*l*) 8 Sim. 189.

(*m*) 24 Beav. 618.

(*n*) See, also, *Lord Lilford v. Keck*, L. R. 1 Eq. 347; *Barnwell v. Iremonger*, 1 Dr. & Sm. 255.

Again, if a *leasehold* estate subject to a mortgage be specifically bequeathed, the specific legatee must take the legacy *cum onere*, if the testator's personal estate be insufficient for the payment of his debts and legacies; and consequently the pecuniary legatees are entitled to have the assets marshalled, and to stand in the place of the mortgagee as against the leasehold estate. (*o*)

Another instance of marshalling the assets in favor of legatees occurs where one or more legacies are charged on the real estate, and there is another legacy which is not so charged. There the legatee, whose legacy is not so charged, shall stand in the place of the former legatees, to be satisfied out of the real assets. (*p*)

It is clearly established that the court will not marshal assets in favor of a charitable bequest, so as to give it effect out of the personal assets, it being void so far as it touches any interest in land. (*q*)

(*o*) *Johnson v. Child*, 4 Hare, 87.

(*p*) *Bligh v. Lord Darnley*, 2 P. Wms. 620; *Bonner v. Bonner*, 13 Ves. 379; 2 My. & Cr. 700. [Though a legatee may elect, or may be compelled to resort to the personal estate, as the fund first liable to the payment of a legacy, yet the legatees of the personal estate, thus applied, will, in equity, be entitled to stand in the place of the legatees, whose legacies were charged on the land, as against the land itself. *Adams Eq.* 263, note; *Lockwood v. Stockholm*, 11 Paige, 87; *Cryder's Appeal*, 11 Penn. St. 72; *Bell C. J. in Perry v. Hale*, 44 N. H. 366, 367; *Paterson v. Scott*, 1 De G., M. & G. 531.] There is no distinction between the case of a class of legacies and a case of individual legacies, for the court presumes that the testator's intention in charging the land is that all the legacies shall be paid in full. *Scales v. Collins*, 9 Hare, 656.

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(*q*) *Mogg v. Hodges*, 2 Ves. sen. 52; S. C. 1 Cox, 9; *Atty. Gen. v. Tyndall*, Ambl. 614; S. C. 2 Eden, 207; *Foster v. Blagden*, Ambl. 704; *Hillyard v. Taylor*, Ambl. 713; *Foy v. Foy*, 1 Cox, 163; *Ridges v. Morrison*, 1 Cox, 180; *Atty. Gen. v. Hurst*, 2 Cox, 364; *Makeham v. Hooper*, 4 Bro. C. C. 153; *Hobson v. Blackburn*, 1 Keen, 273; *Williams v. Kershaw*, Ib. 274, note; *Philanthropic Society v. Kemp*, 4 Beav. 581; *Sturge v. Dimsdale*, 6 Beav. 462. But see *Robinson v. Geldard*, 3 Mac. & G. 735; 3 De G. & Sm. 499, as to charitable bequests which may be regarded as demonstrative legacies. See, also, *Tempest v. Tempest*, 7 De G., M. & G. 473, per Lord Cranworth; *Beaumont v. Oliveira*, L. R. 4 Ch. App. 309, affirming the decision of *Stuart V. C.* in L. R. 6 Eq. Cas. 534.

* BOOK THE SECOND.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR, IN RESPECT OF THE ACTS OF THE DECEASED; AND OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR, IN RESPECT OF HIS OWN ACTS.

CHAPTER THE FIRST.

OF THE LIABILITY OF THE EXECUTOR OR ADMINISTRATOR IN RESPECT OF THE ACTS OF THE DECEASED.

SECTION I.]

The General Question as to what Claims upon the Deceased survive against the Executor or Administrator.

THE general rule has been established from very early times, In matters of contract: with respect to such personal claims as are founded upon any obligation, contract, debt, covenant, or other *duty* that the right of action, on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator. (a) Therefore, it is clear that the executors or administrators are answerable, as far as they have assets, for debts of every description due from the deceased, either debts of record, as judgments, statutes, or recognizances; or debts due on special contract, as for rent or on bonds,

(a) Touchst. 482; 1 Saund. 216 a, note (1) to Wheatley v. Lane; [1 Chitty Pl. (16th Am. ed.) 58; 2 Chitty Pl. (16th Am. ed.) 120, 121; Harrison v. Sampson, 2 Wash. 155; Lee v. Cooke, 1 Wash. 306; Holbrook v. White, 13 Wend. 591; ante, 785, note (c); University of Vermont & State Agricultural College v. Baxter's Es-

tate, 43 Vt. 645.] It was said by Willes C. J. in Sollers v. Lawrence, Willes, 421, that "actions on the case for all sorts of debts and duties are now daily brought against executors, though this was formerly doubted. But the law has been now so settled at least 150 years."

covenants, and the * like, under seal ; or debts on simple contract, as notes unsealed, and promises not in writing, either expressed or implied. (b) So an executor may be sued by the lord of a manor for a relief due from the testator. (c)

In the case of *Eton College v. Beauchamp*, (d) there was a rent issuing out of lands, and the tertenant died, leaving arrears due to Eton College. And it was decreed that, though the person of the tertenant was not chargeable with the rent at law, but only the land by way of distress, yet his executor should pay the arrears as far as he had assets. So it is said, that where a man binds himself and his heirs, and leaves real assets, the heir, taking the profit, becomes so far a debtor, that his executor shall be charged. (e)

In the case of *Wilson v. Tucker*, (f) an action was sustained against the executor of an attorney for negligence by the deceased, in transacting the business of the plaintiff. (f¹)

And there is no difference between a promise to pay a debt certain, and a promise to do a collateral act, which is uncertain, and rests only in damages, as a promise by the testator to give such a fortune with his daughter, to deliver up such a bond, &c. For, wherever in those cases the testator himself is liable to an action, his executors shall be liable also. (g)

It must be observed, however, that certain *forms* of action do not, at the common law, survive against the executor or administrator, as will hereafter be shown in the investigation of the subject of remedies generally. (h) But other * actions were substituted in their room upon the very same cause, which do survive and lie against the executor or administrator. (i)

The executors or administrators so completely represent their testator or intestate, with respect to the liabilities above mentioned, that every bond, or covenant, or contract of the deceased

(b) Bac. Abr. Exors. P. 1 ; Com. Dig. Admon. B. 14. 114 ; *ante*, 801, note (l²) ; *post*, 1734, note (m¹).]

(c) *St. John v. Bawdripp*, Noy, 43 ; Com. Dig. Admon. B. 14.

(d) 1 Chanc. Cas. 21.

(e) *Wentw. Off. Ex.* 249, 256, 14th ed. ; *Henningham's case*, Dyer, 344 b.

(f) 3 Stark. N. P. C. 154 ; S. C. 1 Dow. & Ryl. N. P. C. 30. See, also, *Dutton v. Tayley*, 18 Hill, MS. 285.

(f¹) [*Miller v. Wilson*, 24 Penn. St.

(g) Bac. Abr. Exors. P. 2 ; *Berisford v. Woodroff*, Cro. Jac. 404 ; *Clark v. Thomason*, Cro. Jac. 571 ; *Fawcett v. Carter*, W. Jones, 16 ; S. C. Palm. 329 ; Cro. Jac. 662 ; *Sanders v. Esterbie*, 1 Roll. Rep. 266 ; S. C. Cro. Jac. 417.

(h) *Infra*, pt. v. bk. 11. ch. 1.

(i) *Hambly v. Trott*, Cowp. 375, by Lord Mansfield.

[1722] [1723]

includes them, although they are not named in the terms of it ; (*k*) for the executors or administrators of every person are implied in himself. (*l*)

In *Harwood v. Hilliard*, (*m*) a sale was to be made of a parcel of land, and it was agreed, between the plaintiffs and the defendant's testator, that if it should not produce a certain sum, then they should repay each other proportionably to the abatement ; and the defendant's testator covenanted for himself and his executors to pay his proportion to the plaintiffs, so as the plaintiffs gave him notice in writing of the said sale, by the space of ten days ; but it was not said that such notice was to be given to his executors or administrators. And the whole court agreed, that, as the covenant ran in interest and charge, the executor was bound to pay the testator's proportion, although the notice was given to the executor and not to the testator.

It is clear, also, that in many cases a liability may accrue against the executor or administrator, after the death of the testator or intestate, upon a contract made in his lifetime, although the executor or administrator be not named therein. Thus the executor is liable upon a bond which becomes due, or a note payable, subsequently to the death of the testator. (*n*) So where a man covenanted that A. should serve B. as an apprentice for seven years, and died, it was holden, that if A. departs within the term, a writ of covenant lies against the executor of the covenantor, without naming * him. (*o*) So if A. is bound to build a house for B. before such a time, and A. dies before the time, his executors are bound to perform this contract. (*p*) And in cases of this kind

(*k*) *Wentw. Off. Ex.* c. 11, pp. 239, 243, 14th ed. ; *Bradbury v. Morgan*, 1 H. & C. 249, 255 ; [*Harrison v. Sampson*, 2 Wash. 155 ; *Lee v. Cooke*, 1 Wash. 306.]

(*l*) By Lord Macclesfield in *Hyde v. Skinner*, 2 P. Wms. 197.

(*m*) 2 Mod. 268.

(*n*) *Toller*, 463.

(*o*) *Bro. Covenant*, 12 ; *Bac. Abr. Exors.* P. 1.

(*p*) *Quick v. Ludborrow*, 3 Bulstr. 30, by Coke C. J. In the case of *Gordon v. Calvert*, 2 Sim. 253 ; 4 Russ. 581, A. on taking B. as a clerk, took a bond from him and a surety, to secure his duly ac-

counting for his receipts. No time was fixed for the continuance of the service, but it was to be determinable at the option of either party. The surety died. His executrix gave notice to A. that she should no longer consider herself liable on the bond. A. read the notice to B., and required him to execute a new bond, with another surety, which was done. Then B. died, and deficiencies were found in his accounts, subsequent to the notice. And it was held that the executrix of the surety had no equity to support an injunction to restrain an action on the bond.

the executors will be liable even where the heir is named, and the executors are not named, in the contract. (*q*)

Hence it appears that executors or administrators more actually represent their testator or intestate than the heir does the ancestor; for if a man binds himself, his executors or administrators are bound, though not named; but it is not so of the heir, however large an amount of real assets may have descended to him. (*r*)

The proposition, however, that executors or administrators are liable upon every contract of the deceased, although they be not named, must be understood as not extending to cases where the contract is *personal* to the testator or intestate; for in such instances no liability attaches upon the executors or administrators, unless a breach was incurred in the lifetime of the deceased. (*s*) Thus, if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract; for the undertaking is merely personal in its * nature, and, by the intervention of the contractor's death, has become impossible to be performed. (*t*) So a covenant by a master for the instruction of his apprentice is personal to the master, and his executors are not liable upon it. (*u*) Again, in *Cooke v. Colcroft*, (*x*) one William Cooke, the plaintiff's intestate, being a newsman, and entitled to receive every morning thirty copies of the *Daily Advertiser*, assigned his right to the same, and all other his business of a newsman, to the defendant, and covenanted, "that he the said William Cooke should not thereafter exercise the business of a newsman, but should use his utmost endeavors to procure for the said defendant his customers in the said business." And in consideration of the premises, the defendant covenanted to pay

(*q*) *Williams v. Burrell*, 1 C. B. 402.

(*r*) Co. Lit. 209 *a*; Wentw. Off. Ex. c. 11, pp. 239, 240, 14th ed.

(*s*) *Hyde v. The Dean of Windsor*, Cro. Eliz. 533. See the remark of Parke B. in *Siboni v. Kirkman*, 1 M. & W. 423; [*McGill v. McGill*, 2 Metc. (Ky.) 458; 1 Chitty Pl. (16th Am. ed.) 58; 2 Chitty Pl. (16th Am. ed.) 120; 2 Chitty Contr. (11th Am. ed.) 792, 1411; *Shuler v. Millsaps*, 71 N. Car. 297.]

(*t*) *Marshall v. Broadhurst*, 1 Tyrwh.

349, by Lord Lyndhurst. In *Wentworth v. Cock*, 10 Ad. & El. 45, Patteson J. said that there was a case at Liverpool, where a contract to build a lighthouse was held to be ersonal, on the ground of its being a matter of personal skill and science. *Robinson v. Davison*, L. R. 6 Ex. 269, 274.

(*u*) *Baxter v. Burfield*, Bott. P. L. pl. 696, 6th ed.; S. C. 2 Stra. 1266; *infra*, 1765.

(*x*) 2 W. Bl. 856; S. C. 3 Wils. 380.

eight shillings a week to the said William Cooke, his executors, administrators, and assigns, during the lives of the said William Cooke and Ann his wife, and the survivor of them. Cooke died, and his wife took out administration, and commenced the business of a newspaper vendor on her own account. The court held that the administratrix was not bound by the covenant, and grounded their judgment on the difference of expression in the two clauses, viz, that Cooke himself, without naming his executors, &c. should abstain from the business of a newsman, but that the payment was to be made to him, his executors, &c.; and that this was now payable to the plaintiff, not as wife, but as administratrix of William Cooke, and was assets for the payment of his debts. Besides, it would be very hard, they said, to bar her from exercising a lawful occupation for her own livelihood, *in consequence of this personal covenant of her husband.

So it is said, that if a lessee for years covenants for himself to repair the houses demised, omitting other words, he is bound to repair only during his life, and the executors or administrators are not bound. (y) And it is also said, that if a lessor covenants, for himself only, to discharge the lessee of all quit-rents out of the land, this covenant is only personal, and will bind the covenantor only during his life. (z) But if in these cases the words "during the term" be added in the covenant, as on a covenant by a lessee for himself to repair the houses during the term, or on a covenant by a lessor for himself to discharge the lessee of all quit-rents during the term; in these cases, it appears, the executors and administrators also will be charged after his death. (a)

In *Wentworth v. Cock*, (b) the plaintiffs had entered into an agreement with one Cock to supply him with a certain quantity of slate immediately; and with a certain other quantity, monthly, at a fixed price; and with any further quantity, monthly, that he might require. He engaged to receive the slate, not exceeding 200 tons per month, and the agreement was to be in force till January 1st, 1838. An action having been brought against his administrator, for refusing to receive slate sent, in pursuance of

(y) Touchst. 178. But see *Wentw. Off. Ex.* 250, 14th ed. *contra*.

(a) Touchst. 178, 482. See, also, *Williams v. Burrell*, 1 C. B. 402.

(z) Touchst. 178; *Ingery v. Hyde*, *Dyer*, 114 a. But see *Wentw. Off. Ex.* 251. *ubi supra*.

the contract, after his death, and before January 1st, 1838, it was contended that the contract was personal to the deceased, and was not obligatory on his representatives. But the court of queen's bench held that the plaintiff might well sue the administrator. And Lord Denman said it was like any ordinary case of goods ordered by a testator, which the executor must receive and pay for. (*b*¹) And Littledale J. * observed, that the administrator was bound to pay damages, out of the assets, if he did not take the contract upon himself. In *Cooper v. Jarman*, (*c*) where a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished, it was held by Lord Romilly M. R. that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate.

But it must be borne in mind that the authority of an agent is revoked by the death of his principal; (*c*¹) consequently the agent cannot, generally speaking, sue the executor of the principal in respect of services as agent after his death, though performed in pursuance of a contract made with him in his lifetime. Thus, in *Campanari v. Woodburn*, (*d*) where A. had agreed with B. that he would endeavor to sell a picture belonging to B., and that if he succeeded in selling the same, B. should pay him 100*l.*; and B. died before his picture was sold; it was held that A. could not recover the 100*l.* from B.'s executor. (*d*¹)

It must here be observed, that in the case of *Perrot v. Aus-*

(*b*¹) [See *Mactier v. Frith*, 6 Wend. 103. A lumber manufacturer agreed to sell all the lumber sawed at his mill during five years, and that the quantity should average a certain number of feet per year, without stipulating as to the quantity to be delivered in any one year, the same to be paid for as delivered. Both parties died before the five years expired. In a suit by the administrators of the vendor against the executor of the vendee, for lumber delivered by the former to the latter, under the contract, it was held that the original contract was merely personal, and was dissolved by the death of either party, and that the administrators were liable only for breaches committed in the lifetime of their intestate. *Dickenson v. Callahan*, 19 Penn. St. 227.]

(*c*) L. R. 3 Eq. Ca. 98.

(*c*¹) [1 Chitty Contr. (11th Am. ed.) 278, and cases in note (*a*), 376; 2 Ib. 1412; *M'Kee v. Myers*, Addis. 31.]

(*d*) 15 C. B. 400.

(*d*¹) [A contract made by a firm consisting of two partners, for the employment of an agent in their business for a term of years, was held to be discharged by the death of one of the partners before the expiration of the term. *Tasker v. Shepherd*, 6 H. & N. 575. As to the liability of executor or administrator for advances made on continuing guaranty of the testator or intestate, after his decease, see *Bradbury v. Morgan*, 1 H. & C. 249; *post*, 1770.]

tin, (e) it is said to have been resolved by the court that if one covenants that his executors shall pay 10*l.*, no action lies for this against them. (e¹) But Lord Mansfield, in *Plumer v. Marchant*, (f) said that *Perrot v. Austin* was an extraordinary case, and there is a query in the very report. (g) * And in *Powell v. Graham*, (h) it was held that an action might be sustained against an executor, upon a promise by the testator, that his executor should pay to the plaintiff the sum of 20*l.* in consideration that the plaintiff would continue in the service of the testator till his death; and that it was not necessary to aver any promise by the executor to pay it.

With regard to the liability of an executor in respect of the
in matters tortious acts of the deceased, it was a principle of the
of tort: common law, that if an injury was done either to the
person or property of another, for which *damages* only could be
recovered in satisfaction, the action died with the person by whom
the wrong was committed; (i) and at this day (unless the case
falls within the statute 3. & 4 W. 4, c. 42, s. 2, hereafter to be
mentioned), (j) where the cause of action is founded upon any
malfeasance or misfeasance, is a tort, or arises *ex delicto*, such as

(e) Cro. Eliz. 382.

(e¹) [The intestate executed and delivered an instrument under seal, signed in the presence of two witnesses, in which, in consideration of love and goodwill to A. B. deceased, and of services by him performed in his lifetime, the intestate directed her administrator to pay to the widow of A. B. a specified sum of money; it was held that the widow could not maintain an action upon such instrument against the administrator. *Stone v. Gerish*, 1 Allen, 175. Merrick J. said: "The instrument signed by the defendant's intestate certainly is not a contract; it does not even purport to be so. She is the only party to it. It is a mere attempt to make a gift, after her decease, out of her estate, to a third person."]

(f) 3 Burr. 1383.

(g) In fact it appears from the statement of the case, in Wentw. Off. Ex. 250, 14th ed., that the decision of *Perrot v. Austin* was merely as to the form of action.

"In some cases," says that author, "no action of debt lieth upon a covenant to pay money; as if A. covenant that his executor shall within a year, or such a time after his death, pay 10*l.* to B.; now for that no action of debt was maintainable against A. himself, it lieth not against his executor, but only an action of covenant; as was held in the late queen's time." See *Randall v. Rigby*, 4 M. & W. 132, per Parke B.; and *Ex parte Tindal*, 3 Bing. 402; S. C. 1 M. & Scott, 607, where Tindal C. J. and Littledale J. expressed their opinion, in which Lord Brougham concurred, that if a man covenants that his executors shall pay a sum of money after his death, this creates a debt just as much as if he himself had covenanted to pay it.

(h) 7 Taunt. 580; S. C. 1 B. Moore, 305.

(i) 1 Saund. 216 a, note (1) to *Wheatley v. Lane*.

(j) *Post*, 1734.

trespass, (*j*¹) for taking goods, &c. trover, (*j*²) false imprisonment, assault and battery, slander, (*j*³) deceit, (*j*⁴) diverting a water-course, obstructing lights, and in many other cases of the like kind, where the *declaration* imputes a tort done either to the person or property of another, and the *plea* must be not guilty, the rule is *actio personalis moritur cum personâ*; and if the person by whom the injury was committed dies, no action of that kind can be brought against his executor or administrator. (*k*)

Accordingly, no action lies against an executor or administrator on a penal statute. (*l*) So if a man, served with a *subpœna*, and having had his expenses tendered to him, neglects to appear as a witness, and dies, no action lies against his executor or administrator. (*m*) Again, if a *sheriff, jailer, or keeper of a prison, suffer one in execution for debt or damages to escape, though hereby the party, at whose suit the execution was, be entitled not only to an action upon the case against such officer by the common law, but also to an action of debt by the statutes Westm. 2, and 1 Rich. 2, c. 12; yet if the officer die, no action lies against his executor for the same; because the suffering the escape was a wrong of the nature of a trespass. (*n*) So at the common law, if a man was appointed executor, and committed a *devastavit* and

(*j*¹) [Nicholson v. Elton, 13 Serg. & R. 415; Harris v. Creashaw, 4 Rand. 14; Perry v. Wilson, 7 Mass. 395.]

(*j*²) [Hench v. Metzer, 6 Serg. & R. 272; Jarvis v. Rogers, 15 Mass. 398; Barnard v. Harrington, 3 Mass. 288. Trover survives against an executor or administrator by statute in Alabama. Nations v. Hawkins, 11 Ala. 859. And so in Massachusetts and other states, actions survive for goods taken and carried away or converted by a party to his own use. See Genl. Sts. Mass. c. 127, § 1; *post*, 1734, note (*m*¹); Terhune v. Bray, 16 N. J. (Law) 54; Cravath v. Plympton, 13 Mass. 454.]

(*j*³) [See Long v. Hitchcock, 3 Ham. 274; More v. Bennett, 65 Barb. 338.]

(*j*⁴) [See Boyles v. Overby, 11 Grat-tan, 202.]

(*k*) 1 Saund. 216 a, note (1). [As to replevin, see Mellen v. Baldwin, 4 Mass. 480; Merritt v. Lambert, 8 Greenl. 128; M'Evers v. Pitken, 1 Root, 216.]

(*l*) Wentw. Off. Ex. 255, 14th ed. [An action on the case will not lie against the executors of a deceased marshal for a false return made by him on an execution, or for imperfect and insufficient entries made therein. United States v. Daniel, 6 How. (U. S.) 11. See People v. Gibbs, 9 Wend. 29. Causes of actions arising from mere tort, such as the default of a postmaster, in his clerks embezzling money from letters, do not survive. See Franklin v. Low, 1 John. 396.]

(*m*) Wentw. Off. Ex. 255, 14th ed.

(*n*) Anon. Dyer, 271 a; Whitacres v. Onsley, Dyer, 322 a; Perkinson v. Gifford, Cro. Car. 540; Bro. Escape, 28; Exors. 100; Execution, 86, Parliament, 80; Wentw. Off. Ex. 254, 14th ed.; Berwick v. Andrews, Ld. Raym. 973, by Lord Holt; Hambly v. Trott, 1 Cowp. 375; 1 Saund. 216 a, note (1). But debt lies against the executors of a sheriff, &c. upon a judgment obtained against the testator for an escape. See *post*, 1740.

died, the executor of such executor was not liable for the *devastavit*, upon the principle that it was a personal tort in his testator, which died with the person. (o) But now, by the statute 30 Car. 2, c. 7, explained and made perpetual by 4 & 5 W. & M. c. 34, s. 12, the executors or administrators of any executor or administrator, whether rightful or of his own wrong, who shall waste or convert to his own use the estate of his testator or intestate, shall be liable and chargeable in the same manner as their testator or intestate would have been if they had been living. (p)

In some, however, of the cases above mentioned, a remedy may be had against the executor or administrator in another * form. Thus, although, at the common law, an action of trover upon a conversion of the testator dies with him, yet if the goods, &c. taken away, continue still *in specie*, in the hands of the executor or administrator of the wrong-doer, replevin or detinue will lie against such executor or administrator to recover them back; (q) or trover, laying the conversion to have been by the executor; (r) or, in case they are sold, an action for money had and received to recover their value. (s) Again, an action on the custom of the realm against a common carrier is for a tort and supposed crime; and the plea is not guilty; therefore, at the common law, it will not lie against the carrier's executors. But an action of assumpsit will lie against them, upon the very same cause. (t) So if a man take a horse of another, and bring him back again, an action of trespass will not lie, at the common law, against his executor, though it would against him; but an action for the use and hire

(o) Sir Brian Tucke's case, 3 Leon. 241; Browne v. Collins, 1 Ventr. 292. But he was liable in equity. Price v. Morgan, 2 Chanc. Cas. 217.

(p) 1 Saund. 219 d, note to Wheatley v. Lane; Coward v. Gregory, L. R. 2 C. P. 153. In the case of Hammond v. Gatliffe, Andr. 254, the court were strongly inclined to be of opinion that an executor *de son tort* of an executor *de son tort* is not liable at common law for a *devastavit* committed by the first; and that such an executor is not within the statute of Car. 2, because (as Probyn J. said) in the first part of the act, executors *de son tort* are not named, though afterwards they are expressly mentioned.

(q) Le Mason v. Dixon, W. Jones, 173, 174; 1 Saund. 217, note (1); [Newsum v. Newsum, 1 Leigh, 86.]

(r) 1 Cowp. 373. [See Allen v. Harlan, 6 Leigh, 42; Catlett v. Russell, 6 Leigh, 344; Walter v. Miller, 1 Harr. (Del.) 7; Underhill v. Morgan, 33 Conn. 105; Denny v. Booker, 2 Bibb, 427; Thompson v. White, 45 Maine, 445; Clapp v. Walters, 2 Texas, 130.]

(s) 1 Cowp. 377; 1 Saund. 217, note (1); [United States v. Daniel, 6 How. (U. S.) 11; Cravath v. Plympton, 13 Mass. 454; Wilbur v. Gilmore, 21 Pick. 250.]

(t) Cowp. 375, by Lord Mansfield; S. P. by Sir J. Mansfield C. J. in Powell v. Layton, 2 New Rep. 370.

of the horse will lie against the executor. (*u*) So if a man deals as agent for another without authority, his executor, though he cannot be sued for the tort, may be made liable upon an implied contract. (*v*)

So in the case of *Perkinson v. Gilford*, (*x*) debt was brought against the executors of a sheriff, for money which he had levied under a *fi. fa.* and had not paid over; the not paying over the money was a misfeasance as well as a nonfeasance, yet it was determined, that by the receipt of * the money, the sheriff became debtor, and that debt might be maintained for it; that is to say, though he was guilty of a breach of his duty as sheriff, and though no action could be maintained for that breach of duty after his death, yet for the money so recovered his executors were chargeable. (*x*¹)

Again, at the common law, an action of trespass for mesne profits cannot be maintained against an executor or administrator; (*y*) yet he is, perhaps, liable in an action for use and occupation for the rent up to the day of the demise in the action of ejectment. (*z*) But if there has been a recovery in ejectment, it is clear that no action will lie against the executor for use and occupation for the rent subsequent to the day of demise laid in the declaration; because, having treated the holding as founded in trespass, the plaintiff cannot afterwards treat it as founded on contract. (*a*) And in such instances the simple case of the death

(*u*) Cowp. 375, by Lord Mansfield.

(*v*) *Collen v. Wright*, 7 El. & Bl. 301; S. C. in error, 8 El. & Bl. 647. So, though the executor of an innkeeper cannot be sued in tort for the loss of a guest's goods (unless under stat. 3 & 4 W. c. 42, s. 2, *post*, 1734), he may be sued on an implied assumpsit. *Morgan v. Rarey*, 2 Fost. & F. 283.

(*x*) Cro. Car. 539; S. C. W. Jones, 430; *Adair v. Shaw*, 1 Sch. & Lef. 265. See, also, *Packington v. Culliford*, 1 Roll. Abr. 921, tit. Exors. H. pl. 2.

(*x*¹) [But not in debt for an escape in the lifetime of their testator, the action being founded on tort. *Martin v. Bradley*, 1 Caines, 124.]

(*y*) *Pulteney v. Warren*, 6 Ves. 86; [*Harker v. Whitaker*, 5 Watts, 474; *Bard v. Nevin*, 9 Watts, 328. But see *Molton*

v. Mumford, 3 Hawks, 490; and *Haldane v. Duche*, 2 Dallas, 176, where it was held that assumpsit will lie against executors to recover the *mesne* profits of an estate of which the testator had wrongfully possessed himself.]

(*z*) 6 Ves. 86; *Turner v. Cameron's Coalbrook Company*, 5 Ex. 932.

(*a*) *Birch v. Wright*, 1 T. R. 378. See, also, 6 Ves. 87; and *Bridges v. Smyth*, 5 Bing. 410; S. C. 2 Moo. & P. 740. However, the mere bringing of an ejectment and laying the demise before the time of the rent accruing, is no bar to an action for use and occupation. *Cobb v. Carpenter*, 2 Campb. 14, note to *Balls v. Westwood*. *Secus, semble*, if the ejectment has been served on the lessee. *Jones v. Carter*, 15 M. & W. 718.

of the occupier will not sustain a bill in equity for an account of mesne profits under the head of accident. (*b*) However, in *Pulteney v. Warren*, (*c*) an account of mesne profits, since the title accrued, was decreed against executors, upon the special ground, that the plaintiff was prevented from recovering in ejectment by a rule of the court of law, and by an injunction at the instance of the occupier; who ultimately failed both at law and in equity. And in a modern case, (*d*) the widow of a testator, with the acquiescence of his heir, * was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died. On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held by Sir J. Leach M. R., and afterwards by Lord Brougham on appeal, that the suit was maintainable for the rents received during her continuance in possession. (*d*¹)

So an action of waste does not lie, at the common law, against an executor, for waste committed by his testator; it being a tort which dies with the person. (*e*) Nor shall an executor be chargeable for the injury done by his testator in cutting down another man's trees. But for the benefit arising to his testator from the sale or value of the trees, he shall. (*f*) Accordingly, in *Powell v. Rees*, (*g*) it was held that an executor is liable to an action for money had and received by his testator, for coal tortiously taken by him from the plaintiff's land, if the testator had sold it, and received the money. (*g*¹) And this, although no direct evi-

(*b*) *Pulteney v. Warren*, 6 Ves. 88.

(*c*) 6 Ves. 72.

(*d*) *Monypenny v. Bristow*, 2 Russ. & My. 117.

(*d*¹) See, also, *Caton v. Coles*, L. R. 1 Eq. 581.

(*e*) 2 Inst. 302; 2 Roll. Abr. 828, pl. 7; 2 Saund. 252, note to *Green v. Cole*. A bill was brought against the executors of a jointress, to have satisfaction out of assets for permissive waste upon the jointure of the testatrix. But by Cowper C., "The bill must be dismissed; for here is no covenant that the jointress shall keep the jointure in good repair, and in the common case, without some particular cir-

cumstances, there is not remedy in law or equity for permissive waste after the death of the particular tenant." *Turner v. Buck*, 22 Vin. Abr. 523, pl. 9, tit. Waste (*s* a.).

(*f*) Cowp. 376, by Lord Mansfield.

(*g*) 7 Ad. & El. 426; S. C. 2 Nev. & P. 571.

(*g*¹) [There are many cases where a party has been held entitled to waive the tort done in the conversion by sale of his property, and to sue in an action for money had and received. See 1 Chitty Pl. (16th Am. ed.) 112, and note (*s*) and cases cited; *Morton J. in Wilbur v. Gilmore*, 21 Pick. 250, 252; *Mellen v. Baldwin*, 4 Mass. 450;

dence be given of the actual sum received on the sale, if the jury believe the fact of the sale. So Lord Chancellor Cowper held, in the case of *The Bishop of Winchester v. Knight*, (*h*) that the lord of a manor might bring a bill for an account of ore * dug, or timber cut by the defendant's testator. And his lordship observed, that it would be a reproach to equity to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy. And his lordship further remarked that it was true, as to the trespass of breaking up meadow, or ancient pasture ground, it died with the person ; but as to the property of the ore or timber, it would be clear, even at law, if it came to the executor's hands, that trover would lie for it ; and if it had been disposed of in the testator's lifetime, the executor, if assets are left, ought to answer for it. So if a man commits equitable waste, and dies, as where tenant for life without impeachment of waste, and as such having a right at law to cut timber on the estate, and a property in the trees, abuses that power, by cutting ornamental trees, or trees not ripe for cutting, a court of equity has jurisdiction to make the personal representatives of the party, who has committed such waste, accountable for the produce of it. (*i*) But a court of equity will not direct an account, against the executor or administrator of tenant for life without impeachment of waste, of dilapidations permitted by him in and about the mansion-house. (*j*)

Again, an action would not lie against the executor of a parishioner, by whom tithes were subtracted, to recover the treble value under the statute of Edward the Sixth, even although the testator were a lessee for years so that his estate came to his executor ; for, being founded on a personal tort, it died with the person. (*k*) But the executor would have been liable in another form of proceeding ; for the tithes, when severed, belonged to the tithe-owner ;

Cravath v. Plympton, 13 Mass. 454 ;
Holmes v. Moore, 5 Pick. 257 ; *Towle v.*
Lovet, 6 Mass. 394. In this action the
 plaintiff waives all torts and special dam-
 ages, and recovers only for the money re-
 ceived. *Hanna v. Pegg*, 1 Blackf. 181 ;
Wilder v. Aldrich, 2 R. I. 513.]

(*h*) 1 P. Wms. 406. See *Powell v.*
Aiken, 4 Kay & J. 352, per Wood V. C.

(*i*) *Lansdowne v. Lansdowne*, 1 Madd. 116.

(*j*) *Lansdowne v. Lansdowne*, 1 Jac. & W. 522.

(*k*) *Wentw. Off. Ex.* 254, 14th ed. ; *Holl v. Bradford*, 1 Sid. 88 ; *Weekes v. Trussell*, 1 Sid. 181 ; *Moreton v. Hopkins*, 2 Keb. 502 ; *Com. Dig. Admon. B.* 15.

and the case, therefore, fell within the principle that where property is *acquired which benefits the testator, an action for the value of the property shall survive against the executor. (l)

It may here be mentioned that the personal representative of the mother of a bastard child is not liable for necessities supplied to the child after her death. (m)

And now by stat. 3 & 4 W. 4, c. 42, s. 2, after reciting that
 3 & 4 W. there is no remedy provided by law for certain wrongs
 4, c. 42: done by a person deceased in his lifetime to another, in
 respect of his property, real or personal; for remedy thereof it is
 actions enacted, "that an action of trespass, or trespass on the
 may be case, as the case may be, may be maintained against the
 brought executors or administrators of any person deceased for
 against any wrong committed by him in his lifetime to another
 executors in respect of his property, real or personal, so as such
 for an in- injury shall have been committed within six calendar
 jury to property, real or per- months before such person's death, and so as such action
 sonal, by shall be brought within six calendar months after such
 the testa- executors or administrators shall have taken upon them-
 tor, com- selves the administration of the estate and effects of such
 mitted six person; and the damages to be recovered in such action
 months be- shall be payable in like order of administration as the
 fore his death: simple contract debts of such person." (m¹)
 within
 what time
 to be
 brought.

(l) By Lord Eldon in *Pulteney v. Warren*, 6 Ves. 89, 90.

(m) *Ruttinger v. Temple*, 4 B. & S. 491.

(m¹) [*Ante*, 796, and note (a¹), 797. It is provided, in Massachusetts, by statute, that in addition to the actions which survive by the common law, the following shall also survive: actions of replevin; of tort for assault, battery, imprisonment, or other damage to the person; for goods taken and carried away or converted by the defendant to his own use; or for damage done to real or personal estate; and actions against sheriffs for malfeasance or nonfeasance of themselves or their deputies. Genl. Sts. c. 127, § 1. "The words 'damage to the person,' in this statute, do not; indeed, extend to torts not directly affecting the person but only the feelings or reputation, such as breach of promise,

slander, or malicious prosecution. *Smith v. Sherman*, 4 Cush. 408; *Nettleton v. Dinehart*, 5 Cush. 543. But they do include every action, the substantial cause of which is a bodily injury, or, in the words of Chief Justice Shaw in 4 Cush. 413, 'damage of a physical character,' whether the connection between the cause and the effect is so close as to support an action of trespass, or so indirect as to require an action on the case at common law. *Hollenbeck v. Berkshire R. R. Co.* 9 Cush. 478; *Demond v. Boston*, 7 Gray, 544." Gray J. in *Norton v. Sewall*, 106 Mass. 143, 145. See *Cutting v. Tower*, 14 Gray, 183; *Aldrich v. Howard*, 8 R. I. 125. In Iowa, "No cause of action, *ex delicto*, dies with either or both the parties, but the prosecution thereof may be commenced or continued by or against their personal representatives." *Laws of*

It was held in the case of *Powell v. Rees*, (*n*) where coal had been tortiously taken from the plaintiff's land by an intestate, who had sold it and received the money, and part had been raised more than six months before his death, and part within six months, that the plaintiff might bring trespass, under this statute, against the administrator, for so much as was raised within the six months, and also money had and received for so much as was raised before; (*o*) the acts being distinct, and therefore the two actions not incompatible.

In *Richmond v. Nicholson*, (*p*) which was an action of *trover for a watch against the defendant, as the executor of one Harriet Reeves, the declaration stated that Harriet Reeves died on the 27th March, 1839, and alleged a conversion by her within six calendar months next before her decease. The defendant pleaded, that Harriet Reeves was not guilty within six calendar months before the time of her death. It appeared on the trial that the watch had been given by Harriet Reeves to one Spencer, in September, 1837; that Spencer redelivered it to her in March, 1838, for the purpose of its being pawned by her; that, on its being de-

Iowa, Revis. of 1860, c. 138, § 3467; *Shafer v. Grimes*, 23 Iowa, 550. Statutes very much enlarging the number of causes of action, which survive, have been passed in many other of the American States, and to these the reader is referred. *Heinmuller v. Gray*, 44 How. Pr. 260; *Arundel v. Springer*, 71 Penn. St. 398; *Aldrich v. Howard*, 8 R. I. 125; *Prescott v. Knowles*, 62 Maine, 277; *McKinlay v. McGregor*, 10 Iowa, 111; *Froust v. Burton*, 15 Miss. 619; *Snider v. Cray*, 2 John. 227. In New York, by statute, and in North Carolina, actions for deceit in the sale of real or personal estate survive against the personal representatives of the defendant. *Haight v. Hoyt*, 19 N. Y. 464; *Arnold v. Lanier*, 4 Law Rep. (N. Car.) 529. See 1 Chitty Pl. (16th Am. ed.) 77 note (*b*²); *Troup v. Smith*, 20 John. 43. An action against a physician for malpractice survives by statute in Indiana, though not at common law. *Long v. Morrison*, 14 Ind. 595. So an action against an attorney for neglect survives his decease. *Miller v. Wilson*, 24 Penn. St. 114. As to actions

for breach of promise of marriage, see 2 Chitty Contr. (11th Am. ed.) 1443; *ante*, 800, note (*l*); 1 Chitty Pl. (16th Am. ed.) 58 note (*k*). An action for libel does not survive the death of the defendant. *More v. Bennett*, 65 Barb. 338; *Waters v. Nettleton*, 5 Cush. 544; *Long v. Hitchcock*, 3 Ohio, 274; *Browner v. Sterdevant*, 9 Geo. 69. Whenever an action might have been revived against an executor or administrator, it may be brought against him. *Butner v. Keelbn*, 6 Jones (Law), 60. In an action of tort against the executor or administrator of the person originally liable, the plaintiff is entitled to recover only for the value of the goods taken, or for the damage actually sustained, without any vindictive or exemplary damages, or damages for any alleged outrage to the feelings of the injured party. Genl. Sts. Mass. c. 128, § 2.]

(*n*) 7 Ad. & El. 426; S. C. 2 Nev. & M. 571, *ante*, 1732.

(*o*) *Ante*, 1732, and note (*g*¹).

(*p*) 8 Scott, 134.

manded by the plaintiff in December, 1838, Harriet Reeves said, "I shall not talk to you any more, but shall see my solicitor." She died in March, 1839. And the court of common pleas held that this was sufficient evidence of a conversion within six months before her death.

In conclusion of this branch of the subject, it may be mentioned, that an action on the case lies, by the custom of England, as it is sometimes expressed, but to speak more correctly, by the common law, against the executors of a parson, vicar, or other ecclesiastical person, at the suit of his successor, for dilapidations of the houses or buildings upon his spiritual benefice. (*q*) So an action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against the executor of his predecessor. (*r*) The law is the same as to a perpetual curate. (*s*) And such an action is maintainable where the hedges and fences belonging to the glebe are left in a state of decay, or where there has been a felling of timber growing thereon, otherwise than for repairs or fuel. (*t*) But it will not lie in respect of pulling *down a building on the rectory and substituting another in a different part, unless the value of the estate be impaired, the burdens on it increased, or the evidence of title impaired. (*u*) Moreover, neglect to cultivate the glebe land in a husbandlike manner is not a dilapidation for which the executors of an incumbent are liable. (*v*) Nor will an action lie for digging gravel in the glebe. (*x*) Formerly, indeed, it was doubted whether any action at law, or elsewhere than in the spiritual court, would lie for dilapidations, even by a succeeding rector, &c. against his predecessor who had vacated by cession or otherwise; (*y*) but that point was determined in *Jones v. Hill*, 2 W. & M. (*z*) And the temporal courts having

(*q*) Wentw. Off. Ex. 255, 14th ed. And by stat. 13 Eliz. c. 10, s. 2, if any spiritual person fraudulently grants away his goods, &c. so as nothing be left to his executors, such grantee shall be liable to the successor's suit in any court ecclesiastical, as he might have been, if the grantee was executor of the grantor.

(*r*) *Radcliffe v. D'Oyly*, 2 T. R. 630, 637.

(*s*) *Mason v. Lambert*, 12 Q. B. 795.

(*t*) 4 B. & Ad. 830.

(*u*) *Huntly v. Russell*, 13 Q. B. 572. See, further, S. C. as to what are acts of waste, for which this action lies.

(*v*) *Bird v. Ralph*, 4 B. & Ad. 826; S. C. 1 Nev. & M. 415.

(*x*) *Ross v. Adcock*, L. R. 3 C. P. 655.

(*y*) See the observation of Buller J. 2 T. R. 637. It is said in Wentw. Off. Ex. 255, 14th ed., that the executors are liable, by the spiritual or ecclesiastical law.

(*z*) 3 Lev. 268.

once taken cognizance of such matters, it should seem that the action was considered to lie against the executors of a deceased rector, &c. from the necessity of the thing; and it is at this day of common occurrence. (a) If the successor dies, without having enforced the right of action, it survives to his executor, who being himself liable to the third incumbent for the whole of the dilapidations existing at the death of his own testator, may recover from the executor of the first incumbent for so much of them as occurred during the first incumbency. (b)

The reason for the liability of the executor or administrator for such dilapidations was thus stated by Lord Chief Justice Willes, in *Sollers v. Lawrence*: (c) “Because it is not considered as a tort in the testator, but as a duty which he ought to have performed; and therefore his representatives, so far as he left assets, shall be equally liable as himself. * And, for this reason, it is not contrary to the rule, that *actio personalis* (which is always understood of a tort) *moritur cum personâ*.” It is observable, however, that this action is in form an action on the case in tort; and that it could not possibly be framed in *assumpsit*, as on a contract; for the plaintiff must be the succeeding rector, &c. who cannot be known until after the death of the predecessor, and of course could not contract with him. It is clearly an exception to the general rule that no action will lie against an executor to which his testator was not liable, for the testator never can be liable, inasmuch as during his life there is no person who can sue. For the same reason this action, however anomalous in other respects, is not contrary to the rule, that *actio personalis moritur cum personâ*; an action cannot be said to die, which never had nor could have had existence. It seems, therefore, not to be quite correctly stated, that “the executor shall be equally liable as the testator.”

An allotment made to a vicar in lieu of tithes, under an inclosure act, is subject to the law and custom of England, as to dilapidations, equally with the ancient glebe; and if, when he comes into it, there are fences upon it which he ought to repair, but he dies leaving them unrepaired, his executors are liable at the suit of his successor. (d) In *Bird v. Relph*, (e) by an inclosure act,

(a) See the judgment of Buller J. in *Radcliffe v. D'Oyly*, 2 T. R. 637.

(b) *Bunbury v. Hewson*, 3 Ex. 558.

(c) Willes, 421.

(d) 2 Ad. & El. 773; 1 Nev & M. 415.

(e) 2 Ad. & El. 773; S. C. 1 Nev. & M.

415.

land was to be allotted to a vicar in lieu of tithes, and was to be first well and sufficiently fenced, in such manner as the commissioners should direct, at the public charge, but forever afterwards to be repaired by the vicar and his successors. An appeal, to be brought within four months, was given to parties aggrieved by anything done in pursuance of the act. The land was allotted and fenced by the commissioners; but the fences being only calculated to last three or four years, became ruinous, and remained so till the incumbent died, about eleven years after the inclosure. No step had been taken to obtain a remedy for the neglect to fence properly. And the * court of king's bench held that the commissioners, by making the fences according to their discretion, had, *prima facie*, fulfilled the condition precedent to the vicar's liability to repair; that if the work was improperly done, steps should have been taken at the time to enforce a due performance of it; and that the executrix of the late vicar was liable to his successor for the dilapidation of the fences.

It may be convenient to investigate, in this place, the extent to which the executor or administrator of a rector, &c. is liable for dilapidations. In *Percival v. Cooke*, (*f*) Best C. J. expressed an opinion at *nisi prius*, that the representatives of a prior incumbent are only liable for such repairs as an outgoing tenant would be bound to perform, and not for complete and finished repairs. (*g*) In *Wise v. Metcalfe*, (*h*) the subject was fully considered by the court of king's bench; and the judges of that court were of opinion that the incumbent is bound to maintain the parsonage (which must be assumed to be suitable in point of size, and other respects, to the benefice) and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; (*i*) and that he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to

(*f*) 2 C. & P. 460.

the glebe. *Bunbury v. Hewson*, 3 Ex.

(*g*) And his lordship in that case expressed his further opinion, that the executors were entitled to be allowed, in such estimate, for timber which the late incumbent might have cut and used in such repairs, and which his successor had used for that purpose. See, also, accord. as to stone and timber, which could be got from

558.

(*h*) 10 B. & C. 299; S. C. 5 Man. & Ry. 235.

(*i*) In *North v. Baker*, 3 Phillim. 309, Sir John Nicholl intimates that, in some cases, the thorough repair of old building is not all to fall on one incumbent. As to when the incumbent may remove hot-houses, see *Martin v. Roe*, 7 El. & Bl. 237.

preserve exposed timbers from decay) and whitewashing and papering belong. And that on this principle the damages must be *calculated in an action for dilapidations against the executor or administrator of a deceased rector by the successor.

The successor may have separate actions against the executor or administrator of the late rector, for dilapidations to different parts of the rectory. (*k*)

It has been the constant habit of courts of equity to charge persons in the character of trustees with the consequence of a breach of trust, and to charge their representatives also; whether they derive benefit from the breach of trust or not. (*l*)

It may here be observed, that if an action is brought against an administrator for a breach of a covenant made by the deceased, it cannot be pleaded in bar that the defendant took out administration at the request of the plaintiff, and on his promise, *not under seal*, that he would not charge, or seek to charge, the defendant as administrator or otherwise with any breaches of the covenant in question. (*m*)

Liability of executor for breaches of trust by testator.

It is no bar to an action against an administrator on a covenant made by the deceased that the defendant took out administration on a parol promise of the plaintiff that he would not sue.

SECTION II.

Of Particular Instances where the Executor or Administrator is Liable with Respect to the Acts of the Deceased.

In the preceding section it has been attempted to collect the principal cases illustrative of the general principle as to the liability of executors and administrators with respect to claims which might be enforced against the deceased himself, if he were living. It remains to advert to some particular instances in which such liability has been established.

* First, as to debts of record. The executor or administrator is bound, as far as he has assets, to satisfy

Debts of record:

(*k*) *Young v. Munby*, 4 M. & Sel. 183.

(*m*) *Harris v. Goodwyn*, 2 M. & Gr.

(*l*) *Adair v. Shaw*, 1 Sch. & Lef. 272; *Montford v. Cadogan*, 17 Ves. 489; *Watham v. Stainton*, 1 De G., J. & S. 678; 1 Hemm. & M. 322; [*Brownlee v. Lockhart*, 20 N. J. Eq. 239.]

405. Perhaps the defendant might have been relieved by application to the court to restrain the action. Per Tindal C. J. 2 M. & Gr. 418.

all judgments recovered against the testator or intestate, without regard to the circumstance whether a judgment was founded on a cause of action which would not have survived his death. Thus, although the executor of a sheriff is not liable to be sued for an escape permitted by his testator, (*n*) yet, if judgment was recovered for such escape against him in his lifetime, his executor is liable upon the judgment. (*o*)

An executor or administrator is also liable upon all statutes and recognizances entered into by the deceased ; (*p*) and upon all the inferior debts of record of the deceased, as fines imposed by the justices at Westminster, or at assizes, or quarter sessions, or by commissioners of sewers or of bankrupts, by stewards in leets, or the like. (*q*)

In the case of a joint contract, where several contract on the same part, if one of the parties die, his executor or administrator is at law discharged from all liability, and the survivor or survivors alone can be sued. (*r*) And if all the parties are dead, the executor of the survivor is

liability of
executor
on joint
contracts
of testa-
tor:

(*n*) See *ante*, 1729.

(*o*) *Whitacres v. Onsley*, Dyer, 322 *a*, *b*.

(*p*) It seems to have been once doubted whether the executor of the conusor of a statute merchant was liable. See *Wentw. Off. Ex. c. 11*, p. 243, 14th ed.

(*q*) *Wentw. Off. Ex. c. 11*, p. 240. But see *Anon. Cro. Jac.* 219.

(*r*) *Godson v. Good*, 2 Marsh. 300, by Gibbs C. J.; *S. C.* 6 Taunt. 594; [*Gere v. Clarke*, 6 Hill (N. J.), 350; *Foster v. Hooper*, 2 Mass. 572; *Simonds v. Center*, 6 Mass. 18; *Rice*, appellant, 7 Allen, 112, 114; *Atwell v. Milton*, 4 Hen. & Munf. 253; *Chandler v. Neil*, 2 Hen. & Munf. 124; *Ayer v. Wilson*, 3 Const. Ct. 319; *Rowan v. Woodward*, 2 A. K. Marsh. 140; *Poole v. M'Leod*, 1 Sm. & M. 391; *Grant v. Shurter*, 1 Wend. 148; *Lawrence v. Interest*, 2 Penn. 724; 1 Chitty Pl. (16th Am. ed.) 58. By statute in Tennessee, a joint action will lie against a surviving partner and the representatives of a deceased partner. *Simpson v. Young*, 2 Humph. 518; *Taylor v. Taylor*, 5 Humph. 112. So in North Carolina. *Brown v. Clary*, 1 Hayw.

107; *Davis v. Wilkinson*, 1 Hayw. 334.

It is provided by statute in Massachusetts that upon the death of one of two or more indebted in a joint contract, his estate shall be liable therefor as if the contract had been joint and several. *Genl. Sts. c. 97*, § 28. See *Burnside v. Merrick*, 4 Met. 544; *Curtis v. Mansfield*, 11 Cush. 152. Referring to this statute, Mr. Chief Justice Bigelow, in *Rice*, appellant, 7 Allen, 115, said: "It is obvious from the terms in which this enactment is expressed, that it does not affect the rule of the common law, which renders the survivor severally liable on a joint contract, after the decease of his co-contractor. This rule still remains in full force." Under the above act of Massachusetts, an action of contract for a debt due from a partnership may be maintained, and a verdict rendered against the executor of a deceased partner, although the estate of such partner is insolvent. *Sampson v. Shaw*, 101 Mass. 145. A surviving partner, who is administrator of the estate of his deceased partner, may be called upon to

alone liable. (*r*¹) Thus, if two retain an attorney, and both die, the executor or administrator of the survivor only shall be charged, and not the executors of both; (*r*²) for a personal contract survives of both parties; otherwise of real contracts, as warranty; and, therefore, where, in an action against the executors of both, they pleaded jointly, and judgment was given for the attorney, it was stayed on motion, because the executor of the survivor only was chargeable, notwithstanding the pleading and admission of the parties. (*s*)

* So in debt upon bond, it appeared upon oyer that A., B., and C. were bound jointly, and that A. was dead; whereas the action was brought against his executor and the other two. Upon demurrer, the court were of opinion that the action was not well brought; for by the death of one of the obligors his executor is wholly discharged. (*t*)

Again, if two enter into a joint bond, and one dies at any time before judgment, the survivor shall be charged alone. (*u*) And if one of two defendants dies after judgment, and the plaintiff elects to take execution against the personalty, the execution must be against the survivor alone. (*x*) So a release given by the obligee to the representatives of the deceased obligor is no answer to an action against the survivor. (*y*)

But if the contract be several, or joint and several, the executor of the deceased contractor may be sued at law in a separate action; (*z*) but he cannot be sued jointly with the survivor; be-

account in the probate court for his settlement of the partnership estate. *Leland v. Newton*, 102 Mass. 350. "This account necessarily involves the settlement of the partnership affairs." *Chapman C. J.* 102 Mass. 351.]

(*r*¹) [*Gere v. Clarke*, 6 Hill (N. Y.), 350; 2 Chitty Contr. (11th Am. ed.) 1356, 1411.]

(*r*²) [The executors or administrators of two deceased obligors cannot be joined in the same action. *Watkins v. Tate*, 3 Call, 521; *Grymes v. Pendleton*, 4 Call, 130.]

(*s*) *Hamond v. Jethro*, 2 Brownl. 99. See, also, *Calder v. Rutherford*, 2 Brod. & Bing. 302; *Slater v. Wheeler*, 9 Sim. 156.

(*t*) *Osborne v. Crosbern*, 1 Sid. 238. See, also, *Towers v. Moor*, 2 Vern. 99; *Richardson v. Horton*, 6 Beav. 185.

(*u*) *Lampton v. Collingwood*, 4 Mod. 315. See statute 8 & 9 W. 3, c. 11, s. 7; reenacted by C. L. Procedure Act, 1852, s. 136; *ante*, 902.

(*x*) If he takes out execution upon the real lien, the charge must be equally against the survivor and the real representative of the deceased; for though a personal execution survives, a real does not. *Sir W. Harbert's case*, 3 Co. 14 a; 2 Saund. 51, note (4) to *Trethewy v. Ackland*.

(*y*) *Ashbee v. Pidduck*, 1 M. & W. 564.

(*z*) *May v. Woodward*, 1 Freem. 248. As to what words will constitute a joint and several bond, see *Tipping v. Coates*, 18 Beav. 401.

cause one is to be charged *de bonis testatoris*, the other *de bonis propriis*. (a)

With regard to the liability in equity of the executor of the deceased joint contractor, it is completely settled that in the case of a partnership debt, although at law, upon the death of a partner, the remedy against his executors is extinguished (inasmuch as a partnership contract is joint), *yet they may be sued in equity. (b) But though it has long ceased to be disputed, that if the surviving partner prove to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction in equity from the assets of the deceased partner, yet it has been lately a subject of much controversy, and still, it is believed, continues to be regarded as an unsettled point, whether the creditor has any right to resort to the representatives of the deceased partner so long as there is a surviving solvent partner, or so long as the insolvency of the surviving partner is not established. On the one hand, it has been asserted that the principle on which the creditor is entitled to relief against the assets of the deceased partner is merely through the medium of the equities subsisting between the partners themselves, and these equities, in respect of creditors, are, that joint debts shall be satisfied out of the joint estate, and that the separate estates of the partners shall not be liable to the demands of the creditors until the sufficiency or insolvency of the joint estate is established. And, therefore, it has been said the joint creditor must pursue the surviving partner in the first instance, and shall not be permitted to resort to the assets of the deceased partner, until it is established that full satisfaction cannot be obtained from the surviving partner. On the other hand, it is contended, that, in the consideration of a court of equity, a partnership debt is several as well as joint, and therefore that the

(a) *Hall v. Huffam*, 2 Lev. 228; [*Kemp v. Andrews*, Carth. 171; 1 Chitty Pl (16th Am. ed.) 58.]

(b) *Vulliamy v. Noble*, 3 Meriv. 619; 4 My. & Cr. 109. See *Holme v. Hammond*, L. R. 7 Ex. 218; [*Collyer Partn.* (5th Am. ed.) §§ 576-583, 580, note (3) and cases cited; 1 Story Eq. Jur. § 676; Story Partn. § 362; *Burnside v. Merrick*, 4 Met. 544; *Camp v. Grant*, 21 Conn. 41; *Fillyan v. Lavery*, 3 Florida, 72; *Bennett v. Woolfolk*, 15 Geo. 213.] This rule is

applicable to the case of executors carrying on their testator's trade, in that character, and in the ordinary course of the business accepting a bill of exchange describing themselves simply as executors of their testator. *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24. The surviving partners are necessary parties to a creditors' suit against the assets of the deceased, and the case is not within the 32d order of August, 1841. *Hills v. M'Rae*, 9 Hare, 297.

joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if anything, * shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner. The more recent decisions are strongly in favor of the latter proposition. In *Devaynes v. Noble*, (c) Sir W. Grant, in effect, decided that a partnership contract is, upon the death of a partner, to be considered as joint and several, and that where the surviving partners are insolvent, a creditor has a right to resort to the estate of the deceased partner, without regard to the state of the accounts as between him and the surviving partners. Two separate petitions of appeal were presented against this decision. The appeals were thrice argued; first, before Lord Eldon; again, in December, 1829, before Lord Lyndhurst; both of whom resigned the great seal, without delivering judgment; and again, for the third time, before Lord Brougham, who affirmed the decree. (d) Again, in the subsequent case of *Wilkinson v. Henderson*, (e) Sir John Leach M. R. held, that in a suit by a joint creditor against the representatives of a deceased partner and the surviving partner, the plaintiff was entitled to satisfaction out of the assets of the deceased partner, though it was not proved that the surviving partner was insolvent. And his honor, in giving his judgment, said that all the authorities establish that, in the consideration of a court of equity, a partnership debt is several, as well as joint. (f) And it has * been laid down that the principle of

(c) 1 Meriv. 530; Sleech's case, 1 Meriv. 539.

(d) 2 Russ. & My. 495. See *Lodge v. Pritchard*, 1 De G., J. & Sm. 610; [(Am. ed.) note (1) and cases cited; *Allen v. Wells*, 22 Pick. 453-455; *M'Culloh v. Dashiell*, 1 H. & Gill, 96; *Dalghren v. Duncan*, 7 Sm. & M. 280; 1 Story Eq. Jur. § 676; *Wilder v. Keeler*, 3 Paige, 167; *Payne v. Matthews*, 6 Paige, 19; *Murray v. Murray*, 5 John. Ch. 50; *Hammersley v. Lambert*, 2 John. Ch. 509, 510; *Woodrop v. Ward*, 3 Desaus. 203; *Hall v. Hall*, 2 McCord Ch. 302; *Bowden v. Schatzell*, 1 Bailey Eq. 260; *Simmons v. Tongue*, 3 Bland, 356; *Cammack v. John-*

son, 1 Green (N. J.), 163; *Morgan v. His Creditors*, 20 Martin (La.), 599; *Jarvis v. Brooks*, 23 N. H. 136; *Crockett v. Crain*, 33 N. H. 542; *Bell v. Newman*, 5 Serg. & R. 93; *Walker v. Eyth*, 25 Penn. St. 216; *Merrill v. Neill*, 8 How. (U. S.) 414; *Morrison v. Kurtz*, 15 Ill. 193; *Cleghorn v. Ins. Bank*, 9 Geo. 319; *Baker v. Wimpee*, 19 Geo. 87; 2 Lindley Partn. (3d Eng. ed.) 1095 *et seq.*

(e) 1 My. & K. 582. See, also, *Brown v. Weatherby*, 12 Sim. 6; *Way v. Bassett*, 5 Hare, 68; 1 De G., J. & S. 616.

(f) In *Brown v. Gordon*, 16 Beav. 310, Romilly M. R. said that the debt, though gone at law, remains due in equity, be.

[1743] [1744]

the latter proposition extends to every joint contract for a loan of money, giving to the creditor the benefit of the security of several persons; without any distinction that the debt must be a mercantile debt incurred by joint traders. Thus, in *Thorpe v. Jackson*, (g) where four persons had opened a joint account with certain bankers, who advanced them money on such joint account, Alderson B. held, that upon the decease of one of the joint contractors, the bankers had a right in equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors, or showing that the latter were unable to pay by reason of their insolvency. (h)

In *Barker v. Buttress*, (i) a question arose as to the application of these doctrines to the executors of a deceased member of a joint stock banking company, with reference to the stat. 7 Geo. 4, c. 46 (the banking act). After the expiration of three years from his death, a suit had been instituted for the administration of his estate, and the common decree made for taking an account of his debts, and persons who were creditors of the banking company at his death, and had recovered judgments against the company, claimed before the master; and it was contended on their behalf that the testator having been liable to them in his lifetime, though, at law, the debts had survived against his * copartners, yet his estate continued liable in equity. But it was held that the remedies given by the act were not cumulative, but substitutional

cause equity considers it to be unjust that where two or more persons are jointly liable, the death of one should throw the whole debt on the others, and exonerate his estate. In *Ridgway v. Clare*, 19 Beav. 111, the same learned judge took occasion to express his opinion as to the mode in which the court administers assets in cases of this description as follows, viz: Where both partners are solvent, there is no distinction made between joint and several creditors; they are all paid, and in taking the partnership accounts, the joint debts thus paid will be allowed in account by the surviving partner. If the estate of the deceased partner be insolvent, and that of the surviving partner solvent, the joint creditors will naturally go against the surviving partner, who will then be a cred-

itor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his share. If both the deceased and surviving partner are insolvent, then the joint creditors must resort, in the first instance, to the joint estate, and can only go against the separate estate of each partner after the claims of his separate creditors have been satisfied. If both parties die before administration takes place, the rule is the same. See, also, *Lodge v. Pritchard*, 4 Giff. 294; 1 De G., J. & S. 610. See, further, on this subject, *Dixon on Partnership*, 513, 514.

(g) 2 Y. & Coll. 533.

(h) But see *Slater v. Wheeler*, 9 Sim. 157; *Other v. Ivison*, 3 Drew. 177, 181, 182.

(i) 7 Beav. 134.

for the ordinary liabilities of partners ; (*k*) and that consequently the claims were barred by the lapse of the three years, being the time limited by the act. (*l*)

The true doctrine on the subject of obtaining relief in equity by considering joint contracts as several, appears to be, that wherever a court of equity sees that in a contract joint in form, the real intention of the parties was, that it should be joint and several, it will give effect to such intention. Accordingly, in certain cases, a joint bond has, in equity, been considered as several. (*m*) But it is not a rule that every joint contract shall be considered as several in a court of equity ; for a joint contract cannot be extended beyond its legal operation, unless the party seeking so to extend it shows some previous equity entitling him to demand a several contract from each of the joint contractors, or unless there is some ground on which to infer mistake in the nature of the instrument. (*n*) In the case of a partnership debt, all the partners have had a benefit from the money advanced, or the credit given, and the obligation to pay exists independently of any instrument by which the debt may have been secured. (*o*) So where a joint bond has, * in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation, and it was not the bond which first created the liability to pay. But where the obligation exists only by virtue of a joint covenant or bond, the extent of its operation can be measured only by the words in which it is conceived ; and a court of equity cannot give the instrument any other than its legal effect. (*p*) Accordingly, where a joint promissory note, signed “ J. and J. Ewing—James Parr, *surety*,” was given to a creditor

(*k*) See *Steward v. Greaves*, 10 M. & W. 711, accord.

(*l*) See 3 M. & G. 203, by Lord Truro, accord. See, also, *Heward v. Wheatley*, 5 De G. & Sm. 552, from which it appears that the 13th section makes it necessary that a creditor who has obtained judgment against the company should try, and try in vain, to enforce it against the members for the time being, before he can come in under a decree for the administration of the estate of a deceased shareholder.

(*m*) *Primrose v. Bromley*, 1 Atk. 90 ; *Bishop v. Church*, 2 Ves. sen. 100, 371 ;

Hoare v. Contencin, 1 Bro. C. C. 27 ; *Thomas v. Frazer*, 4 Ves. 399 ; *Burn v. Burn*, 3 Ves. 573 ; *Ex parte Kendall*, 17 Ves. 525 ; *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24 ; *ante*, 1742, note (*b*).

(*n*) In case of such a mistake, it seems that equity will relieve as well against a surety as a principal. *Rawstone v. Parr*, 3 Russ. 424, 539.

(*o*) *Sumner v. Powell*, 2 Meriv. 37.

(*p*) *Sumner v. Powell*, 2 Meriv. 30 ; S. C. affirmed, 1 Turn. & R. 423 ; *Richardson v. Horton*, 6 Beav. 185.

of the firm of John and James Ewing, and James Parr died, John and James Ewing being both alive, one of whom afterwards became bankrupt, and the other insolvent; it was held that the promissory note could not be considered as several, against James Parr the surety. (*q*) So where A. and B. were obligors in a joint bond, and A., who was alleged to be the principal debtor, died; it was held that his assets were not, in equity, liable upon the bond, but that the liability survived to B. (*r*) Again, where premises had been demised to A. and B. who were copartners, upon which they carried on their partnership business, and A. died during the lease, and, after his death, his executors carried on the business in copartnership with B. on the premises; it was held, nevertheless, that the covenants in the lease, which were joint only, were not to be considered in equity as several as well as joint, so as to make A.'s estate liable for breaches of the covenant which occurred after his death. (*s*)

It being now settled, beyond dispute, that the estate of a deceased partner is liable in equity to the creditors of the firm, although the legal remedy exists only against the survivors, a further question remains to be considered, viz, * when and by what means that liability is to terminate. It seems clear that the deceased partner's estate must continue liable until the debts, which affected him at the time of his death, are, in some way, fully discharged. (*t*) The discharge, however, may take place in various ways; not only by direct payment, but also by dealings with the continuing partners operating as a payment of the joint debt, or from the creditors having agreed to take and taking the security of the surviving partners in discharge of the joint debt. (*u*) Or there may be an equitable bar to the remedy; for as the right stands only upon equitable grounds, if the dealing of the creditor with the surviving partners has been such as to make it inequitable that he should go against the assets of the deceased partner, he will not, upon general rules and principles, be entitled to the benefit of the demand. (*x*) But the estate of the deceased partner is not discharged

(*q*) *Rawstone v. Parr*, 3 Russ. 424, 539; 925; 4 My. & Cr. 110; *Brown v. Gordon*, 16 Beav. 302. See, also, *Lee v. Flood*, 2 Other v. Iveson, 3 Drew. 177.

(*r*) *Richardson v. Horton*, 6 Beav. 185. Sm. & G. 250; *Blair v. Bromley*, 5 Hare,

(*s*) *Clarke v. Bickers*, 14 Sim. 639. See, 555, per Wigram V. C.; *Lyth v. Ault*, 7 also, *Dixon on Partnership*, 512 *et seq.* Ex. 669.

(*t*) *Vulliamy v. Noble*, 3 Meriv. 619. (*x*) *Ex parte Kendall*, 17 Ves. 526, by

(*u*) *Thompson v. Percival*, 5 B. & Ad. Lord Eldon; 4 My. & Cr. 110.

by the mere circumstance that the creditor, knowing of the death, continues his transactions with the surviving partners, and forbears for several years, at their request, to take any steps to enforce payment of his debt ; (y) nor by his receipt of interest from them and a new partner. (z)

With respect to the right of a surviving co-contractor to enforce contribution from the personal representatives of his deceased companion ; although it cannot be stated as a universal proposition that in all cases where two or more jointly employ a third person, there is an implied undertaking in all to contribute ratably *inter se*, so as to bind the executors of a deceased co-contractor ; yet if several persons jointly contract for a chattel, to be made or procured for the * common benefit of all (for instance, the building of a ship or the furnishing of a house), *and as to which the executors of any party, dying before the work is completed, are by agreement to stand in the place of the party dying ;* in such a case, though the legal remedy of the party employed would be solely against the survivors, yet the law would certainly imply a contract on the part of the deceased co-contractor, that his executors should contribute his proportion of the price of the article to be furnished. (a)

With respect to the liabilities of the executors of shareholders in public companies ; where the deed of settlement provides that the company shall continue for a certain term of years, and that the shares of a deceased proprietor shall belong to his personal representatives, but that they shall not be deemed proprietors until they are duly admitted, and have executed the deed of settlement, or done some other act, and then, and not before, they are to become proprietors and receive the dividends, it is established that, on the death of a shareholder, his estate, and consequently his executors or administrators, in their representative capacity, continue liable

Liability
of execu-
tors, as
such, of
deceased
sharehold-
ers in pub-
lic com-
panies.

(y) *Winter v. Innes*, 4 My. & Cr. 101.

(z) *Harris v. Farwell*, 13 Beav. 403.
For other cases relating to these doctrines,
see *Dixon on Partnership*, 520 *et seq.* ;
[*Beach v. Norton*, 9 Conn. 182 ; *Calvert v.*
Marlow, 18 Ala. 67.]

(a) *Prior v. Henbrow*, 8 M. & W. 873.

See, also, *Batard v. Hawes*, 2 El. & Bl.
287, 298, *post*, 1773, note (i), where the
court seemed to think the executors liable
without any special agreement. [See
Bachelor v. Fisk, 17 Mass. 464.]

until a new personal liability has been created pursuant to the deed. (*b*)

The executors of one whose name has, since his decease, been inserted in the last filed memorial or return (under 7 & 8 Vict. c. 113, s. 19) are not liable to execution on * a judgment against the company, although the testator was properly returned as a shareholder in previous memorials. (*c*)

In every case where the testator is bound by a covenant, the executor shall be bound by it, if it be not determined by the death of the testator; (*d*) that is, unless it is such a covenant as was to be performed by the person of the testator. (*e*) Thus, in *Thursden v. Warthen*, (*f*) a lord of a manor covenanted for himself, his heirs, and executors, within seven years to convey, upon request, a copyhold to the plaintiff for life, *secundum consuetudinem manerii*. The covenantor died, and the plaintiff requested his executor to convey the copyhold, which he refused; and thereupon, the plaintiff brought an action of covenant against the executor. It was objected that the declaration did not show what estate the covenantor had in the manor, and therefore it should be intended to be a fee-simple; and if so, then the request ought to have been made to him who was to make the estate, and this was the heir; for the executor could not possibly perform the covenant, and so no breach by him. But Coke, chief justice, said that the request made to the executor was good; because executors represent the person of the testator as to the performance of covenants to be in covenant performed. And to this the whole court (except Houghton, justice) agreed; and judgment was given for the plaintiff.

So in the case of *Macartney v. Blundell*, (*g*) in Dom. Proc.,

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| <p>(<i>b</i>) In re Northern Coal Mining case, 13 Beav. 133; S. C. (<i>nomine</i> Blakeley's case) 3 Mac. & G. 726. See, also, Gouthwaite's case, 3 Mac. & G. 187; Keen's Executor's case, 3 De G., M. & G. 272; Heward v. Wheatley, Ib. 628. See, further, as to the liabilities of the executors of deceased shareholders, In re Herefordshire Bank, 33 Beav. 435; In re East of England Bank, L. R. 1 Eq. 219; In re Leeds</p> | <p>Banking Company, L. R. 1 Ch. App. 231; Baird's case, L. R. 5 Ch. App. 725.
 (<i>c</i>) Powis v. Butler, 3 C. B. N. S. 645, affirmed in error, 4 C. B. N. S. 469.
 (<i>d</i>) Bro. Covenant, pl. 12; Com. Dig. Covenant, C. 1.
 (<i>e</i>) Hyde v. Dean of Windsor, Cro. Eliz. 553; Bally v. Wells, 3 Wils. 29.
 (<i>f</i>) 2 Bulstr. 158.
 (<i>g</i>) 2 Ridgw. P. C. 113.</p> |
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the appellant claimed the renewal of a lease, pursuant to a covenant, against the heirs of the covenantor. They refused, alleging that the covenantor was bare tenant for life. And it was holden that this refusal was a breach * of the covenant for which an action could be maintained at law against his representatives.

The executor is not only liable upon all covenants by the testator which have been broken in his lifetime, (*h*) but, moreover, he is answerable for all breaches in his own time, as far as he has assets. For the privity of contract of the testator is not determined by his death. (*i*) Thus, if a tenant in tail leases for years, and dies, and the issue in tail ousts the termor, he shall have covenanted against the executors, upon an express covenant for quiet enjoyment. (*k*)

Again, although a covenant in a lease should be of a nature such as to run with the land, so as to make the assignee of the term liable for a breach of it after the assignment, yet this shall not discharge the executor of the original lessee from a concurrent liability on the covenant, as far as he has assets, even although the lessor shall have accepted the assignee as his tenant.

Therefore, where the lessee has assigned the term in his lifetime, the lessor may still maintain an action of covenant against the executor of the lessee, upon an express covenant for payment of rent, even although the lessor has accepted the assignee for his tenant. And so may the assignee of the reversion, by virtue of the stat. Hen. 8, c. 34. (*l*)

* So if the executor himself assigns the term, the lessor may afterwards bring covenant against the executor, not-

liability of
executor
of land-
lord and
tenant:

in cove-
nant:

(*h*) Wentw. Off. Ex. 251, 14th ed.

(*i*) Coghill v. Freelove, 3 Mod. 326.
[See Hovey v. Newton, 11 Pick. 421.]

(*k*) F. N. B. 145, E. note (*a*).

(*l*) Brett v. Cumberland, Cro. Jac. 521, 522; 1 Saund. 241 *a*, note (5) to Thursby v. Plant. But although the executor of the original lessee will be liable for breaches of covenant, incurred after an assignment by the testator or by himself, it is otherwise where the testator was the assignee of the lessee; for no action will lie against

him except in respect of breaches in his own time; and therefore, all future liability may be discharged by assignment over, even to a pauper. Taylor v. Shum, 1 Bos. & Pull. 21. And since such a course is quite justifiable, morally, as well as legally, after an offer to surrender the lease to the landlord, the executor may be guilty of a *devastavit* in neglecting to adopt it. Rowley v. Adams, 4 My. & Cr. 534.

withstanding any acceptance of the assignee as tenant. And so, also, may the assignee of the reversion. (*m*)

Hence an executor, when he carries a lease to market, has a right to require that the purchaser shall covenant for indemnity against the payment of rent and performance of covenants, notwithstanding the executor himself is not bound to enter into a covenant for the title, but only that he has done no act to encumber. (*n*)

It must be observed, however, that there is a distinction, with respect to this liability, between an express covenant and a mere covenant *in law*. For no action lies against an executor or administrator upon a covenant in law, which is not broken till after the death of the testator. (*o*) Accordingly, in the case of *Adams v. Gibney*, (*p*) a tenant for life, *remainder over, demised to the lessee, his executors, &c. for the term of fifteen years, *without any express covenant for quiet enjoyment*. The lessee was evicted by the remainderman, after the death of the tenant for life, but before the expiration of the fifteen years. And the court of common pleas held that the lessee could not maintain an action of covenant against the executor of the tenant for life, in respect of such eviction, although it was admitted that the word "demise" in the lease imported and made a covenant *in law* for quiet enjoyment by the lessee during the continuance of the estate out of which the lease was granted. (*p*¹)

(*m*) *Hellier v. Casbard*, 1 Sid. 266; S. C. 1 Lev. 127; *Coghill v. Freelove*, 3 Mod. 325. But see stat. 22 & 23 Vict. c. 35, s. 27, *ante*, 1345, 1346, note (*n*).

(*n*) *Staines v. Morris*, 1 Ves. & B. 8; *Wilkins v. Fry*, 1 Meriv. 265, 266. Even if there be no such covenant, yet if the lessor proceeds against the executor, and recovers damages for a breach of the covenant after the assignment, the executor may have an action on the case, or *assumpsit*, against the assignee, for having neglected to perform the covenant, whereby the executor sustained damage. *Burnett v. Lynch*, 5 B. & C. 589; *Marzetti v. Williams*, 1 B. & Ad. 424, by Lord Tenterden; *Moule v. Garrett*, L. R. 5 Ex. 132. But this liability in the assignee continues no longer than his interest as such. *Wolveridge v. Steward*, 1 Cr. & M. 644; *Humble v. Langston*, 7 M. & W. 530;

Rowley v. Adams, 4 My. & Cr. 540. Though, perhaps, the executor has the same remedy against each subsequent assignee in respect of the breaches committed during the continuance of the interest of each. 1 Cr. & M. 660.

(*o*) *Swann v. Stransham*, Dyer, 257 a; *Bragg v. Wiseman*, 1 Brownl. 22; *Proctor v. Johnson*, 2 Brownl. 214; *Newton v. Osborn*, Style, 387; *Porter v. Swetnam*, Style, 407; *Netherton v. Jessop*, Holt, 412; *Andrew v. Pearce*, 1 New Rep. 158; Touchst. 160; Com. Dig. Covenant, C. 1; *Adams v. Gibney*, 6 Bing. 656. See, also, *Williams v. Burrell*, 1 C. B. 402, as to what shall constitute an implied or an express covenant within the meaning of this rule.

(*p*) 6 Bing. 656.

(*p*¹) [Damages may be recovered for breach of covenant for quiet enjoyment,

With respect to the liability of the executor of the lessee to an action of *debt* for rent accrued after the death of the testator, it is fully established that the executor will be ^{in debt:} liable as long as the lease continues, and as far as he has assets, as well in that form of action as in covenant, notwithstanding the lessor assigned the term before his death, or the executor has done so since. (*q*) But if the lessor has *accepted the assignee as his tenant*, then no action of debt will lie against the executor for rent accrued since the assignment, although, as it just appeared, an action of covenant may be maintained on an express covenant for its payment during the continuance of the lease.

This may be the proper place to consider more fully ^{personal liability of executor for rent accrued after testator's death:} a subject, which has been already partially discussed, (*r*) viz, * the personal responsibility of the executor for the rent incurred under a demise to his testator. (*r*¹)

If the whole rent incurs in the lifetime of the testator, the ac-

accruing both before and after the death of the covenantor, in one and the same cause of action against his administrator. *Hovey v. Newton*, 11 Pick. 421.]

(*q*) It is true that Lord Coke, in Walker's case, 3 Co. 24 *a*, says that "it was adjudged in *Overton v. Sydhall*, that if the executor of a lessee for years assigns over his interest, an action of debt does not lie against him for rent due after the assignment; and that if lessee for years assigns over his interest, an action of debt does not lie against him for rent due after the assignment; and that if lessee for years assigns over his interest and dies, the executor shall not be charged for rent due after his death; for by the death of the lessee the personal privity of contract as to the action of debt in both cases was determined." But this is contrary to all the subsequent authorities. See *Coghill v. Freelove*, 3 Mod. 325; *Pitcher v. Tovey*, 4 Mod. 76; 1 Saund. 241 *b*, note (5).

(*r*) *Ante*, 680.

(*r*¹) [It has been held in New York, in the case of *Van Rensselaer v. Platner*, 2 John. Cas. 17, that the executors and administrators of a grantee in fee are liable in covenant for the rent when the grantee has covenanted for himself, his executors

and administrators, to pay a rent in fee; and the same rule prevailed in Pennsylvania until the recent case of *Quain's Appeal*, 22 Penn. St. 510, in which Lowrie J. spoke as follows: "Does a ground-rent covenant survive against executors and administrators? In its usual form, it binds heirs, executors, administrators, and assigns, but still this may be satisfied as to executors and administrators, if they pay the rent that accrued in the decedent's lifetime. It is a perpetual covenant, and it is totally impracticable to require it to be performed by executors and administrators, for their office is not perpetual. If we retain the perpetuity of the covenant as against them, even with the restriction that they are to be liable only when the resort to the land is ineffectual, we still prevent all distribution of the estate in their hands; and, as all the lands of the decedent are assets for the payment of debts, we constructively charge the rent of a single lot upon all his lands. It is a covenant payable, in the contemplation of the parties, out of the profits of the land; and it would be entirely unreasonable that the law should hold the administrator for the rent, when it gives the land to the heir." See *Smith's Land. & Ten.* 378.]

tion to recover it from the executor must be brought against him in his representative character; and, therefore, if the form of action be in debt, it must be in the *detinet* only, and not in the *debet* and *detinet*; and the judgment must be *de bonis testatoris*. (s)

But in an action of debt for rent incurred after the death of the lessee, *if the executor enters* upon the demised premises, the lessor has his election, either to sue him as executor, or to charge him personally as assignee in respect of the perception of the profits. (t) Therefore, if the action be brought in debt, the lessor may either sue the defendant as executor in the *detinet*, (u) or in the *debet* and *detinet*, (x) as assignee of the term. (y) So, in covenant, the lessor has * his election, either to charge the executor as executor, (z) or as assignee, without naming him executor, stating generally in the declaration that the estate of the lessee in the premises lawfully came to the defendant. (a)

If the executor does not enter, (b) he is still chargeable * as ex-

(s) 1 Roll. Abr. 603, S. pl. 9; Fruen v. Porter, 1 Sid. 379.

(t) Boulton v. Canon, 1 Freem. 337; S. C. Pollexf. 125; 1 Saund. 1, note (1) to Jevens v. Harridge.

(u) Royston v. Cordrye, Aleyn, 42; Hope v. Bague, 3 East, 2.

(x) Hargrave's case, 5 Co. 31; Rich v. Frank, Cro. Jac. 238; Caly v. Joslin, Aleyn, 34; 1 Saund. 1, note (1). So if the executor enters he may be charged in the *debet* and *detinet* for the current half-year's rent which commenced before the testator died. The Bailiffs of Ipswich v. Martin, Cro. Jac. 411; Jevens v. Harridge, 1 Saund. 1. But if one sum of money is due for arrears of rent which became due in the lifetime of the testator, and another sum for arrears due in the executor's own time, the lessor cannot in one action charge the executor in the *detinet* for the one part, and in the *debet* and *detinet* for the other; for then two different judgments would be necessary; Salter v. Codbold, 3 Lev. 74; but one action may be brought for both sums in the *detinet* only. Aylmer v. Hide, 13 Geo. 2; B. R. M. S. Selw. N. P. 610, 6th ed. If the lessor in such case will

not waive his right of demanding satisfaction out of the estate of the executor, he must bring two actions.

(y) In such cases it appears to have been the practice to name the defendant executor, and to state in the declaration, in the *debet* and *detinet*, the demise to the deceased, his death, the grant of administration to the defendant, his entry into the demised premises, and the subsequent accruing of rent. See the entry in Jevens v. Harridge, 1 Saund. 1, and the case of Caly v. Joslin, Aleyn, 34. But it is sufficient to charge the defendant in the *debet* and *detinet* as assignee generally, without naming him executor. See Lyddall v. Dunlap, 1 Wils. 4, 5; Wollaston v. Hakewill, 3 M. & Gr. 297; *infra*, note (b).

(z) Buckley v. Pirk, 1 Salk. 317.

(a) Tilney v. Norris, 1 Ld. Raym. 553; S. C. 1 Salk. 309; Carth. 519; Buckley v. Pirk, 1 Salk. 317; 1 Saund. 1, note (1).

(b) There seems to be some doubt, whether this distinction, as to the entry of the executor, has not, in a great measure, ceased to exist since the decision of Williams v. Bosanquet, 1 Brod. & Bing. 238. That case decided (overruling Eaton v. Jacques, Dougl. 455) that the assignee, in

ecutor in the *detinet*, because he cannot so waive the term as not to be liable for the rent as far as he has assets: (c)

Where the executor, having entered, is sued in the *debet* and *detinet*, as assignee, for rent incurred after his entry, he cannot

fact, of a lease may be charged as assignee on a covenant contained in it for the payment of rent, though he has never occupied or actually become possessed. And it does not appear altogether clear, whether it is not a consequence, that an executor may likewise be charged, as assignee in law, without entry. See the observation of Parke B. at the conclusion of his judgment, in *Nation v. Tozer*, 1 Cr., M. & R. 176; 4 Tyrwh. 565. Since these remarks were written, the point above suggested has been much discussed in the C. P. in the case of *Wollaston v. Hake-will*, 3 M. & Gr. 297; S. C. 3 Scott N. R. 593. In that case the plaintiffs declared, as assignees of a lessor, on certain covenants contained in a lease for ninety-nine years, and alleged that all the estate of the lessee, Thomas Stead, of and in a great part of the demised premises, "by assignment thereof then made, came to and vested in the defendant, whereupon and whereby the defendant became and was possessed of the said part of the said demised premises, and continued so possessed, until the commencement of this suit." And the plaintiffs then proceeded to assign a breach of covenant for the non-payment of certain additional rents reserved by the lease, and also a breach of covenant in not keeping the premises in repair. The defendant, by her plea, traversed "that all the estate, &c. of the said Thomas Stead, of and in the said part of the said premises by assignment thereof made, came to and vested in her, in manner and form, &c.;" upon which issue was joined. After trial and verdict for the plaintiffs, a motion for a nonsuit was made on the ground of an alleged variance between the allegation in the declaration, charging the defendant generally as assignee of the lease, and the proof offered at the trial, whereby she appeared to be only executrix of an assignee, and

that she had never entered or taken the profits. But the court was of opinion that there was no variance. And Tindal C. J., in delivering the judgment of the court, said, that as to the argument that the executor, by being charged generally as assignee, becomes thereby liable *de bonis propriis*, the answer is that he may, by proper pleading, discharge himself from personal liability, by alleging that he is not otherwise assignee than by being executor of the lessee, and that he has never entered or taken possession of the demised premises; and from all liability as executor by alleging that the term is of no value, and that he has no assets. But that, if instead of relieving himself by pleading, he takes issue on the fact, whether he is assignee or not, the evidence that he is executor proves the affirmative of the issue that he takes the term by assignment. And his lordship referred to the case of *Green v. Lord Listowell*, 2 Ir. Law Rep. 384, as having determined this precise point. See, also, *Ackland v. Pring*, 2 M. & Gr. 937. As to an executor *de son tort*, see *Paull v. Simpson*, 9 Q. B. 365. This subject has been again considered in the recent case of *Kearsley v. Oxley*, 2 H. & C. 896. In that case the declaration charged the defendant as assignee of a lease, and alleged the non-payment of rent. The defendant pleaded that administration *de bonis non* of the lessee was granted to a woman whom he afterwards married, and that neither he nor his wife ever entered into nor took possession of the demised premises, nor did they vest in the defendant otherwise than as in and by the plea appeared. And it was held that this plea afforded a good answer to the action as an argumentative traverse that the defendant was assignee.

(c) *Howse v. Webster*, Yelv. 103; *Helier v. Casbert*, 1 Lev. 127.

plead *plene administravit*, (*d*) even although he be named executor in the declaration; (*e*) for if the rent be of less value than the land, as the law *prima facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else; and therefore the plea of *plene administravit* confesses a * misapplication, since no other payment out of the profits can be justified till the rent is answered. (*f*) And if judgment be given against the executor, it is *de bonis propriis*. (*g*) But if the land be of less value than the rent, the executor may plead the special matter, viz, that he has no assets, and that the land is of less value than the rent, and pray judgment whether he shall be charged otherwise than in the *detinet* only. (*h*) If, however, such a plea be pleaded to the whole rent in the declaration, it will not be a good bar unless it shows that there were no profits at all; because the executor is chargeable personally for so much of the rent as the premises are worth. If, therefore, the profits have been less than the rent, and therefore cover a part only, that part should be confessed and the plea pleaded to the remainder. (*i*) In * *Remnant v. Bremridge*, (*k*) which was an

(*d*) *Caly v. Joslyn*, Aleyn, 34; *Helier v. Casbert*, 1 Lev. 127, 128; *Sackvill v. Evans*, Freem. 171; *Buckley v. Pirk*, 1 Salk. 317.

(*e*) See *ante*, 1753, note (*y*).

(*f*) *Buckley v. Pirk*, 1 Salk. 317.

(*g*) Wentw. Off. Ex. 285, 286, 14th ed.; 1 Saund. 1, note (1). So if the executor be sued in *assumpsit* for use and occupation in his own time, he shall be liable *de bonis propriis*, though it be laid that the defendant occupied as executor. *Wigley v. Ashton*, 3 B. & Ald. 101. See *Atkins v. Humphrey*, 3 C. B. 654.

(*h*) *Billinghurst v. Spearman*, 1 Salk. 297; *Buckley v. Pirk*, 1 Salk. 317; 1 Saund. 1, note (1). In many instances the profits of the land may be insufficient for a given period, although the lease may, on the whole, be beneficial. As in respect to the rent for the occupation of premises from Michaelmas to Lady Day, especially where almost the whole profit is taken in the summer; as, formerly, in

the case of a lease of tithes or of meadow grounds which are usually flooded in the winter. Wentw. Off. Ex. 289, 14th ed. So the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value; as in the case of a lease of woods, which are fellable only once in eight or nine years, and the felling has been very recent. Ib. 290. In these and the like instances, the executor is personally liable only to the extent of the profits, and for such proportion of the rent as shall exceed the profits is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets; and in such case, to an action brought by the lessor against him in the *debet* and *detinet*, he must disclose the matter by special pleading. 1 Salk. 317; Toller, 280.

(*i*) *Rubery v. Stevens*, 4 B. & Ad. 241; S. C. 1 Nev. & M. 185. In that case the plaintiff having declared, in covenant, for

(*k*) 8 Taunt. 191; S. C. 9 B. Moore, 94.

action for use and occupation generally, where it appeared that the defendant, who was the administrator of the original tenant under an agreement for a lease, had taken possession after the intestate's death, yet, it having been proved by the defendant, under the general issue, that the premises had been productive of no profit to him, and that eight months after the death of the intestate he had offered to surrender them to the plaintiff, it was held that this constituted a good defence to the action.

And on the same principle, although, as it has already appeared, (l) an executor, generally speaking, cannot waive the term, for he must renounce the executorship *in toto*, or not at all; yet, if the value of the land is of less amount than the rent, and there is a deficiency of assets, he may waive such a lease. (m) And if there are assets to bear the yearly loss for some years, but not during the whole term, then, it seems, the executor must pay the rent as long as * the assets will hold out, and must then waive the possession, giving notice to the reversioner. (n)

But if the executor be sued *as executor*, in debt in the *detinet*, for rent incurred after the death of the testator, he may plead *plene administravit*; for that is a good plea wherever no other judgment can be given but only against the defendant as executor. (o)

So, where the executor is charged *as executor*, in an action of covenant, for non-payment of rent incurred in the defendant's own

rent at 26*l.* a year, the defendants pleaded that they were only chargeable as executors, and that the term came to them as such; that the premises were of less yearly value than the said rent of 26*l.*, viz, of no value; and that they had fully administered, &c. The plaintiff replied, that the premises were of the yearly value of 26*l.*, and issue was joined thereon. At the trial the yearly value was found by the jury to be 20*l.* And the court of king's bench held that the replication was, in substance, that the premises were of some value; that the issue was merely informal and cured by verdict; and that the plaintiff might recover the arrears of rent at the rate fixed by the jury. See, also, *Hopwood v. Whaley*, 6 C. B. 744, where in a similar plea, an averment that the defendant "*did not*" was held, after ver-

dict, to mean that he "*could not*" derive any profit from the demised premises; and it was further held that the plea might be taken distributively, and the plaintiff should recover to the extent to which defendant might, by the exercise of reasonable diligence, have derived profit.

(l) See *ante*, 680.

(m) *Wentw. Off. Ex.* c. 11, p. 244, c. 12, p. 290, 14th ed.; *Wilkinson v. Cawood*, 3 Anstr. 309, by Macdonald C. B. (cited by *Wood V. C.* 1 Kay & J. 575). He must, it should seem, promptly offer to surrender the lease, and this will help him as to subsequent breaches of covenant. See *Reid v. Lord Tenderden*, 4 Tyrwh. 118, 120.

(n) *Wentw. Off. Ex. ubi supra*.

(o) *Lyddall v. Dunlapp*, 1 Wils. 5.

time, *plene administravit* is a good plea, although the defendant might have been charged as assignee of the term. (*p*)

- It remains to consider how these points are affected by the assignment of the lease. (*p*¹) If the term was assigned by the testator, it seems clear that the executor cannot be charged as assignee, because the lease did not pass to him; but still he will be liable as executor in debt in the *detinet* for the rent, unless the lessor has accepted the assignee as his tenant; (*q*) and even in that case the executor will be liable, *as executor*, in covenant. (*r*) If the executor enters, and afterwards himself assigns the lease, then he is chargeable, *as assignee*, for that time only during which he occupied. (*s*) And if he is sued for rent incurred since the * assignment by himself, he is liable in his representative character only. Therefore, if the lessor brings an action of covenant against the executor, and charges that after the testator's death, and the proving of the will by the defendant, the demised premises came by assignment to one A. B., and that such assignee has broken the covenants in the lease, the defendant may plead *plene administravit*. (*t*)

personal responsibility of executor for repairs after testator's death: It must here be observed, that the court of common pleas held, in the case of *Tremeere v. Morison*, (*u*) that although, in respect of rent, the personal liability of an executor of a lessee does not exceed the value of the demised premises, yet this qualification does not extend to a covenant for repairs; but that where an executor is sued as assignee on a covenant to repair, he is liable as any other assignee. Accordingly, in that case, a plea by the executor that the demised

(*p*) *Lyddall v. Dunlapp*, 1 Wils. 5; *Wilson v. Wigg*, 10 East, 315. But if issue be joined upon this plea, and it should be proved that the executor has received any profit from the land, there would, it should seem, be a verdict against him; for he could not legally apply the profits to any other purpose than payment of the rent. Therefore, if the land yields some profit, but less than the rent, the executor ought to plead *plene administravit præter* the profit. This doctrine, however, applies only when the action is brought on a covenant in a lease to pay the rent thereby reserved, and not to a case where the assignor of a lease sues

the executor of the assignee on a covenant to perform the covenants in the lease, and to indemnify the assignor for any breach of them, notwithstanding the breach assigned is the non-payment of rent. *Collins v. Crouch*, 13 Q. B. 542.

(*p*¹) [See *Montague v. Smith*, 13 Mass. 405.]

(*q*) *Helier v. Casbert*, 1 Lev. 127. See *ante*, 1752.

(*r*) See *ante*, 1751. See *Leigh v. Thornton*, 1 B. & Ald. 625.

(*s*) See *ante*, 1750, note (*l*).

(*t*) *Wilson v. Wigg*, 10 East, 313.

(*u*) 1 Bing. N. S. 89; S. C. 4 M. & Scott, 607.

premises had yielded no profit, nor had been of any value whatever, since the testator's death, with the addition of an averment of *plene administravit*, and an offer to surrender before the breaches occurred, was held bad on demurrer. (x) The principal ground of this decision appears to have been, that the law is clear that an action of waste will lie against an executor for any waste done in his time, as well permissive as voluntary. (y)

This decision appears to have been to some extent confirmed by the subsequent case in Q. B. of *Hornidge v. Wilson*. (z) That was an action of debt for rent against the defendant as assignee of a term. The defendant pleaded that he was administrator; that the premises were of less value, and had yielded less profit, than the arrears of the rent, that is to say, £——; that he had paid over to the plaintiff all the profit he had received, and had fully *administered, and had offered to surrender. Replication, that the premises were worth more than the sum in the plea mentioned, and a denial of the surrender. The premises were demised by a party, through whom the plaintiff claimed, to N. for twenty-one years, in 1818, the lease containing a covenant by the lessee to repair. N., in 1827, underlet to E. for twelve years, wanting ten days, at a rent exceeding that reserved in the lease. N. died in 1829, and administration was granted to the defendant in 1830. E. died in 1828, and the premises since that time had been occupied by E.'s sister, who for some years had paid the rent, out of which the plaintiff's rent was paid, but had since become insolvent, and her rent had fallen into arrear. The premises had become out of repair, and had been for some years, at the time of the commencement of the action, of less value than the rent reserved in the original lease; but would be of that value if repaired. The defendant had given the plaintiff notice of his willingness to surrender. And the court of queen's bench held, first, that the proof of non-payment of rent by the under-lessee was no defence to this action, on the issue as to the value of the premises. Secondly, that under the same issue, the defendant could not rely on the premises being out of repair as a ground of defence, being himself bound by the covenant to repair. And in *Sleap v. Newman*, (a)

(x) But see the observations of Bayley B. in *Reid v. Lord Tenterden*, 4 Tyrwh. 118, 120.

(z) 11 Ad. & El. 645; S. C. 2 Perr. & D. 641.

(a) 12 C. B. N. S. 116.

(y) See *Ives v. Sammes*, 2 Anders. 51; 2 Inst. 302.

the case of *Tremeere v. Morison* was expressly recognized and acted on by the court of common pleas.

In *Buckworth v. Simpson*, (b) A. demised to B. certain lands and premises for one year certain, and then from year to year, so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions as to the management of the lands and repairing the buildings. The lessee died, and his executors entered into the occupation of the premises, and continued to occupy and paid rent. And the court of exchequer held that they were chargeable in their *personal character, upon the terms contained in the original demise; their continuing to occupy, and the landlord's abstaining from giving notice to quit, raising an implied promise on their parts to abide by the terms of the original contract. (c)

It may be useful, in this place, to recur to the remark which there has already been occasion to make, (d) viz, that if lands are leased for years by demise not under seal, and one of the two executors of the lessee enters into the demised premises, such entry does not inure as the entry of the two executors, so as to make them both liable in an action for use and occupation. (e)

It has been held, (f) that under the stat. 14 Geo. 3, c. 78 (the building act), where a party-wall has been rebuilt, the person who is owner of and entitled to the improved rent of the adjoining premises is liable to contribution out of such rent, though he be no otherwise owner than as an executor or administrator. (g)

In *Abercrombie v. Hickman*, (h) the provisional assignee of the insolvent court, under stat. 1 Geo. 4, c. 119, s. 7, assigned the estate of an insolvent to an assignee, who assented to such assignment, and acted under it as tenant of premises which the insolvent held as lessee for years after the death of such last mentioned assignee.

(b) 1 Cr., M. & R. 834.

(f) *Thacker v. Wilson*, 3 Ad. & El.

(c) See *Arden v. Sullivan*, 14 Q. B. 832, 145.

840.

(g) See *ante*, 1676.

(d) *Ante*, 949.

(h) 8 Ad. & El. 683; S. C. 3 Nev. & P.

(e) *Nation v. Tozer*, 1 Cr., M. & R. 172; 676.

S. C. 4 Tyrwh. 561.

And the court of queen's bench held that his executor was liable to the lessor for breaches of covenants in the lease subsequent to the testator's death, it not appearing that the insolvent court had appointed fresh assignees.

In *Stephens v. Hotham*, (i) Wood V. C. made a decree for a specific performance of a covenant in a lease to take a *renewed lease against the executors of the lessee, who had entered and admitted assets. His honor acted in this case unwillingly, and contrary, it seems, to his own opinion, on the authority of the decision of Shadwell V. C. in *Phillips v. Everard*. (k) And the learned judge said that, in this case, the lease must be so framed that no personal liability should be incurred by the executors; though if the lease were a beneficial one claimed by them, they must enter into full covenants.

granted to
the insol-
vent.

Liability
of executor
on a cove-
nant by
testator to
take a re-
newed
lease.

If the purchaser of a real estate dies, without having paid the purchase-money, his heir-at-law, or the devisee of the land purchased, will be entitled to have the estate paid for by the executor or administrator. (l) And if the personal estate cannot be got in, and the heir or devisee pays for the land out of his own pocket, he may afterwards call upon the personal representative to reimburse him. (m) So, if the personal estate is insufficient to perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will, it should seem, be entitled to the personalty so far as it goes. And it has been decided, that if by reason of the complication of the testator's affairs, the purchase-money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet on the coming in of the assets, the devisee of the estate contracted for may compel the executor to lay out the purchase-money in the purchase of other estates for his benefit. (n)

Liability of
executor of
vendee of
a real es-
tate to
complete
the pur-
chase.

But if a title cannot be made, or there was not a perfect contract, or the court should think the contract ought not to be ex-

(i) 1 Kay & J. 571.

(k) 5 Sim. 102.

(l) *Milner v. Mills*, Mosely, 123; *Broome v. Monck*, 10 Ves. 597.

(m) 10 Ves. 614, 615; 1 Sugd. V. & P.

180, 9th ed. See *Lord v. Lord*, 1 Sim. 505.

(n) *Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Broome v. Monck*, 10 Ves. 597; 1

Sugd. V. & P. 180, 9th ed.

ecuted, in all these cases there is no conversion of real estate into personal, in consideration of the court, upon * which the right of the executor on the one hand, (*o*) and of the heir or devisee on the other, depends. And therefore, if the vendor dies, the estate will go to the heir-at-law of the vendor, in the same manner as if no contract had been entered into; (*p*) and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him. (*q*) The court cannot speculate upon what the deceased party would or would not have done; but in these cases the inquiry must be, whether at his death a contract existed by which he was bound, and which he would be compelled to perform. (*r*) That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor a right to call upon his heir. (*s*)

Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor; and if the executor fails to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy out of the general assets of the testator. (*t*)

Therefore, if a legacy be of a silver cup or a jewel, and it be in pledge at the testator's death, the legatee has a right to call upon the executor to redeem it, and to deliver it to him. (*u*)

So, in *Stewart v. Denton*, (*x*) the testator, a wine merchant, directed by his will that A. B. and C. D. should carry on his trade, and he bequeathed to them his stock of wines. * Before

(*o*) See *ante*, 659, 660.

(*p*) *Lacon v. Mertins*, 3 Atk. 1; *Atty. Gen. v. Day*, 1 Ves. sen. 218; *Buckmaster v. Harrop*, 7 Ves. 341. See, also, *Johnson v. Le Garde*, 1 Turn. & R. 281.

(*q*) *Green v. Smith*, 1 Atk. 573; *Broome v. Monck*, 10 Ves. 597.

(*r*) See *Curre v. Bowyer*, 5 Beav. 6, note (*b*); *ante*, 660.

(*s*) 1 Sugd. V. & P. 189, 9th ed. [A testator, before his decease, gave a bond to convey real estate, and took from the obligee an obligation to take the estate and pay the purchase-money at a time stipu-

lated; the testator executed and acknowledged a deed, but died before the time arrived; when the day of payment arrived, the executor received the purchase-money and delivered the deed; such money having been received by the executor on a personal obligation belonging to the estate, he is bound to account for the same. *Loring v. Cunningham*, 9 Cush. 87; *Hauck v. Stauffer*, 31 Penn. St. 235.]

(*t*) *Knight v. Davis*, 3 My. & K. 358.

(*u*) *Swinb.* pt. 7, s. 20, pl. 18.

(*x*) 4 Dougl. 219; 8 C. 2 Chitt. Rep. 456.

the death of the testator, certain wines belonging to him arrived in a vessel at the port of London, and the vessel was reported. After his death the wines were entered. And it was held that the executors, and not the legatees, were chargeable with the duties.

In *Marshall v. Holloway*, (y) A. having a leasehold estate on which he had covenanted to erect buildings within a certain time, bequeathed it and also his personal estate, ^{of leaseholds:} subject, as to the latter, to the payment of his debts, to trustees for B. for life with several limitations over. A. died before the time expired, leaving the covenant unperformed in part. And Sir L. Shadwell V. C. held that his general personal estate was liable to the performance of the covenant. But it should seem that it was the clause which directed the debts to be paid out of the personal estate which governed this decision. (z) For, unquestionably, the general rule is, that the legatees of leasehold estates must take them *cum onere*, (a) and notwithstanding the general personal estate may remain liable to the lessor by reason of the covenants contained in the lease.

So with respect to specific legacies of shares in banking or other public companies, the legatees are, generally speaking, ^{of shares in public companies.} liable to pay the calls made subsequent to the testator's death. The cases on this subject (b) were fully reviewed by Romilly M. R. in the late case of *Armstrong v. Burnet*, (c) and a distinction drawn by the learned judge, that where the interest of the testator in the subject-matter which he professes to bequeath is complete, or where it is so treated and considered by him and by all persons connected with it, the * future calls fall on the legatee, and not on the general personal estate. But where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then the general personal estate is applicable for that purpose. (d)

(y) 5 Sim. 196.

(z) 10 Hare, 278.

(a) *Hickling v. Boyer*, 3 Mac. & G. 635; *Fitzwilliams v. Kelly*, 10 Hare, 266; 20 Beav. 432. Hence, if the demised premises are dilapidated, the executors may require an indemnity against their liability in this respect from the legatee before letting him into possession. 3 Mac. & G. 635.

(b) *Blount v. Hipkins*, 7 Sim. 43; *Jacques v. Chambers*, 2 Coll. 435; *Clive v. Clive*, Kay, 600; *Wright v. Warren*, 4 De G. & Sm. 367.

(c) 20 Beav. 424.

(d) See, also, *Moffett v. Bates*, 3 Sm. & G. 468; *Day v. Day*, 1 Dr. & Sm. 261; *Addams v. Ferick*, 26 Beav. 384; In re Box, 1 Hemm. & M. 552. The right principle appears to be that if any payments

There has already been occasion to show, that on the death of the master, the agreement for service on the part of the apprentice is at an end, generally speaking. (e) And it seems equally well established, that the executors of the master are discharged from all agreements and covenants *for the instruction* of the apprentice; for these are considered as personal to the testator, and determined by his death. (f) But the covenant on the part of the master *for maintenance* of the apprentice still continues in force; (g) and therefore the executor is liable in an action of covenant, as far as he has assets, if he neglects to maintain him. (h) By the custom of *London, the executor shall put the apprentice to another master of the same trade. (i) As to maintenance of parish apprentices by executors, particular provisions on this head have been made by the statute 32 Geo. 3, c. 57, which has already been stated at large. (k) Where an attorney, to whom a clerk has been articulated, dies before the articles expire, the court of chancery has jurisdiction to entertain a claim for a return of part of the premium, and such claim constitutes a debt payable out of the assets of the attorney. (l)

In case a person assessed to the poor rate dies before payment, it has been doubted how far the goods of the deceased in the hands of his executor or administrator are liable to

were necessary at the testator's death to constitute him a complete shareholder, they must be borne by his estate. But if he was a complete shareholder, all calls made after his death ought to be borne by the specific legatee. 1 Dr. & Sm. 261; 26 Beav. 384. But this does not apply to calls made in the lifetime of a person who is tenant for life of the whole residuary estate, (including the shares) as an entire fund. In re Box, 1 Hemm. & M. 552. See, also, the cases collected, *ante*, 1441, note (v).

(e) *Ante*, 814 *et seq.*

(f) R. v. Peck, 1 Salk. 66; Baxter v. Burfield, 1 Bott. P. L. pl. 696, 6th ed.; S. C. 2 Stra. 1266; Wadsworth v. Guy, 1 Keb. 820; S. C. 1 Sid. 216. The decision in Walker v. Hull, 1 Lev. 177, was *contra*; but the court denied this case in Baxter v.

Burfield, 2 Stra. 1267. But see Cooper v. Simmons, 7 H. & N. 707; *ante*, 816.

(g) R. v. Peck, 1 Salk. 66; S. C. *nomine* R. v. Pett, 1 Show. 405; Baxter v. Burfield, 1 Bott. P. L. pl. 696, 6th ed.; S. C. 2 Stra. 1266; Soam v. Bowden, Finch Rep. 396.

(h) But an order of magistrates, that the executor or administrator shall maintain and provide for the apprentice is bad, and may be quashed. R. v. Pett, 1 Show. 405; S. C. Carth. 231; 1 Salk. 66; 3 Salk. 41; 12 Mod. 27; R. v. Chaplin, Comberb. 324.

(i) By Lord Holt in R. v. Peck, 1 Salk. 66.

(k) *Ante*, 816.

(l) Hirst v. Tolson, 2 Mac. & G. 134. See Winkeep v. Hughes, L. R. 6 C. P. 85, per Willes J.

answer the same. In the case of *Stevens v. Evans*, (*m*) the point was discussed, but not decided, as the case was determined on its own peculiar circumstances, viz, on the ground that it was necessary to convene the administrator before the justices, before a warrant could legally issue to distrain. So that the principal point was undecided; which includes in it these particulars: 1. Where the warrant of distress is made out during the lifetime of the person assessed, whether the officers can follow the goods into the hands of the administrator or any other, without taking notice of any person as executor or administrator. 2. Where the warrant of distress is not made out till after the death of the person assessed, whether on summoning the administrator, and refusal by him, the officers can distrain the goods in the hands of such administrator. 3. Whether the administrator himself may be assessed in a succeeding rate, as for arrears; and on the assessment being confirmed at the sessions upon his appeal, whether distress may be made as of his own goods, and whether for defect of distress he may be committed. * 4. In what course of administration such assessment shall be estimated. And if the administrator shall plead before the justices debts of a higher nature, or insufficiency of assets, whether and how far the justices are to take notice of such plea, and how or in what manner they shall determine the same. (*n*)

rate, where
testator be-
ing as-
sessed dies
before pay-
ment:

It has been held in the ecclesiastical court that the obligation to pay a church-rate is a personal obligation. And that the executor of a deceased parishioner cannot be cited in respect of a church-rate due from his testator. (*o*)

church-
rates.

With respect to debts which a wife contracted while single, and which remained due at the time of the marriage, it is clear that the husband is liable, as long as both parties are alive; (*p*) but this liability, which originated in the marriage,

Debts of
husband
and wife.

(*m*) 2 Burr. 1152; 1 W. Bl. 284.

(*n*) Burn's Justice, title Poor, vol. iv. pp. 228, 229, ed. of 1836.

(*o*) *Williams v. George*, 3 Curt. 343.

(*p*) But now by stat. 33 & 34 Vict. c. 93, s. 12, it is enacted, "that a husband shall not, by reason of any marriage which shall take place after this act has come into

operation [9th of August, 1870], be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts as if she had continued unmarried." See, as to the construction of this section, *Sanger v. Sanger*, L. R.

ceases with it. And therefore upon the death of the husband before the wife, and before payment, the debts survive against her, and the executor of the husband is discharged from them. (*q*)

Again, if the husband survives the wife, he will not be individually responsible for her debts contracted before marriage, however large a fortune he may have received with her. (*r*) Nevertheless, as her administrator, he will be liable to answer for them, to the extent of her assets. (*s*)

* On one occasion, (*t*) Sir John Leach V. C. expressed a doubt, whether the husband has a right to throw his wife's funeral expenses upon her separate estate.

With respect to debts contracted by a wife after marriage, as far as a supply of necessaries, it shall be presumed, as long as he lives, that she had the authority of the husband, as his agent, to procure them for her own use. He may consequently be compelled to pay for them, and so may his executors if he has assets. But the authority will be revoked by the death of the husband; and therefore his executor is not liable for necessaries supplied to the wife after the decease of the husband, even (according to one case) although the fact of his being dead were unknown at the time the necessaries were provided. Accordingly, in *Blades v. Free*, (*u*) a man who had for some years cohabited with a woman that passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad. And it was held that the woman might have the same authority to bind him by her contracts for necessaries as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received. (*x*)

Work and
labor
with a
view to a
legacy.

It may be observed, that if a man performs services for the testator, as if a stock broker transacts all the money concerns of the deceased, without any view to a

11 Eq. Cas. 470. And see *ante*, 748, note (*c*).

(*q*) *Woodman v. Chapman*, 1 Campb. 189.

(*r*) *Wentw. Off. Ex.* 369, 14th ed.

(*s*) *Ib.* 370; *Heard v. Stanford*, Cas. temp. Talb. 173; S. C. 3 P. Wms. 409.

As to what her assets comprise, see *ante*, 846 *et seq.*, 690 *et seq.*

(*t*) *Gregory v. Lockyer*, 6 Madd. 90. See *Bertie v. Chesterfield*, 9 Mod. 31; *Willet v. Dobie*, 2 Kay & J. 647.

(*u*) 9 B. & C. 167.

(*x*) See accord. *Smout v. Ilbery*, 10 M. & W. 11. But see, also, 2 Smith Leading Cas. 395, 4th ed.

reward, but in the expectation of a legacy, he cannot set up any demand for such services against the executor or administrator. (y) Where, however, a surgeon forbore to send in his bill for * medicines and attendance to a deceased patient in her lifetime *under the expectation* of a legacy; and on her death, finding she had left him nothing, he made a claim on her executors; it was held that he was entitled to recover, no proof having been given of any *understanding* between the parties that he was to be paid only by a legacy. (z)

In *Colegrave v. Manby*, (a) a tenant for life of a hos- Executor
of tenant
for life
pital lease, who was directed to lay by, out of the rents

(y) *Osborn v. Guy's Hospital*, 2 Stra. 728; *Le Sage v. Coussmaker*, 1 Esp. 188; [*Little v. Dawson*, 4 Dallas, 111; *Lee v. Lee*, 6 Gill & J. 309; *Livingston v. Ackerton*, 5 Cowen, 531; *Higginson v. Fabre*, 3 Desaus. 91; *Ehle v. Judson*, 24 Wend. 98, 99; *Eaton v. Benton*, 2 Hill, 576; *Roberts v. Swift*, 1 Yeates, 209; *Thompson v. Stevens*, 71 Penn. St. 161, 168; *Crane v. Baudoine*, 65 Barb. 260.]

(z) *Baxter v. Gray*, 3 M. & Gr. 771. But see *Shallcross v. Wright*, 12 Beav. 558. [Where one party has rendered services for another, and it is manifest, from the circumstances of the case, that it was understood by both parties that compensation should be made by will, and none is made, an action lies to recover the value of such services. *Martin v. Wright*, 13 Wend. 460; *Eaton v. Benton*, 2 Hill, 576; *Quackenbush v. Ehle*, 5 Barb. 469. Where, in such a case, a legacy is actually left by the debtor to his creditor, of an amount equal to or greater than the debt, it will be presumed to be in satisfaction of it. *Eaton v. Benton*, 2 Hill, 576. But if the legacy was agreed to be of a certain amount, or a certain piece of land was to be devised, in payment for the services, the value of the land or the amount of the legacy would seem to furnish the measure of damages, in case of a breach of the contract. *Jack v. McKee*, 9 Penn. St. 235; *Bash v. Bash*, 9 Penn. St. 260. This would be true only where the action

was on the contract, and the contract one that might be enforced. But where services had been performed for a party, in consideration of an agreement, not in writing, that the employer should convey or devise land in payment for them, and the action was brought on a *quantum meruit* for the services, it was held that the value of the land was not the fixed measure of damages, although such value is competent evidence to be considered by the jury upon the question of damages. *Ham v. Goodrich*, 37 N. H. 185. It has been held that an action may be maintained against an executor on a parol contract of his testator to bequeath the plaintiff, if he continued to work for him, a certain sum in his will, in addition to the usual wages allowed to work hands. *Bell v. Hewitt*, 24 Ind. 280. A man turned away his wife and daughter without any provision for their support. After many years he solicited his daughter to come and live with him; and promised by letter, that on her doing so she should heir his estate. She accepted his invitation. Her father subsequently drove her away, and, upon his death, bequeathed all his estate to others. The daughter sued the executors, under her father's written promise, and was decreed to be entitled to the estate. *Gary v. James*, 4 Desaus. 185. See *Jacobson v. Le Grange*, 3 John. 199; *Patterson v. Patterson*, 13 John. 379.]

(a) 6 Madd. 72; S. C. 2 Russ. 238.

who neglects to renew lease. and profits, for the purpose of paying the fine on renewal, had neglected to renew, and the lease having been renewed by the remainder-man, after his death, a reference on a bill against his executrix was made, to ascertain what was a reasonable sum to be paid for the renewal; and the same was ordered to be paid by the executrix.

Executors must be admitted to copyhold and pay fines. It was once held that executors continued the estate which their testator had in a copyhold, and, therefore, that they needed no admission. But it is now settled that they must be regularly admitted, and pay their fines. (b)

If a bill of exceptions be sealed by a judge, and he dies, a *scire facias* lies against his executors or administrators to certify it. (c) So if the person who ought to certify a record, as a justice of the peace, &c. who hath taken a recognizance, or a judge of *nisi prius* who hath taken a verdict, or a coroner who hath taken an inquest, &c. happen to die, having such a record in his custody, it seems that a *certiorari* may be directed to his executor or administrator to certify it. (d)

As a court of equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to *complete the gift of the testator. Therefore an act of bounty which has not been perfected by the testator is of no avail against his executor. (e)

Liability of executor of a man who has If a person, who has delivered a deed as an escrow, to be handed over to the party for whose use it is made, upon the performance of some condition, happen to die before the performance of the condition, and the condition be after-

(b) *Bath v. Abney*, 1 Burr. 206; S. C. My. & Cr. 637; *Ward v. Audland*, 8 Beav. 201; *Cox v. Barnard*, 8 Hare, 310; *Bridge v. Bridge*, 16 Beav. 315; *Weale v. Ollive*, 17 Beav. 252; *Beech v. Keep*, 18 Beav. 285; [*Shurtleff v. Francis*, 118 Mass. 154.]

(c) 2 Inst. 428.

(d) 2 Hawk. bk. 2, c. 27, s. 39.

(e) *Hooper v. Goodwin*, 1 Swanst. 485; *Cotteen v. Missing*, 1 Madd. 176; *Meek v. Kettlewell*, 1 Phill. C. C. 342; *Callaghan v. Callaghan*, 8 Cl. & Fin. 374; *Searle v. Law*, 15 Sim. 95; *Dillon v. Coppin*, 4

An executor may be compelled to execute an agreement by the testator to grant an annuity. *Nield v. Smith*, 14 Ves. 491.

wards performed, the deed is available notwithstanding the death of him that made it. (*f*)

delivered a deed as an escrow.

It may here be mentioned that if a testator has given a promissory note in this form, "I promise for myself and my executors to pay A. B. or his executors, one year after my death, 300*l.*, with legal interest," and no proof of the consideration can be given, the note bears interest from its date, and not merely from the testator's death; for, in the absence of all particular proof, it must be presumed that the note was given for value. (*g*)

A note made payable with interest by executors at a certain period from the testator's death, bears interest from the date.

If a man enters into a continuing guaranty and dies, his executor, it has been thought, is not liable upon it for advances made after the testator's death, which operates as a revocation: (*h*)

Executor not liable on a continuing guaranty of testator.

(*f*) By Lord Ellenborough in *Copeland v. Stephens*, 1 B. & Ald. 606, where *executor* appears to be printed by mistake for *escrow*.

(*g*) *Roffey v. Greenwell*, 10 Ad. & El. 222; S. C. 2 Perr. & D. 365.

(*h*) *Smith's Comm. L.* 425, 4th ed. But see, *contra*, *Bradbury v. Morgan*, 1 H. & C. 249.

* CHAPTER THE SECOND.

OF THE LIABILITY OF AN EXECUTOR OR ADMINISTRATOR WITH
RESPECT TO HIS OWN ACTS.

SECTION I.

*Of the Liability of an Executor or Administrator on his own
Contracts.*

IN this section it is proposed to investigate, First. The liability of an executor or administrator, *as such*, in respect of his own contracts *as executor* or administrator. Secondly. The personal responsibility of the executor or administrator on his own contracts. (a)

1st. As to the liability of the executor, not personally, but out of the assets of the testator. It seems to have been once considered, that wherever an action was brought against an executor or administrator, on promises laid to have been made by him after the death of the testator or intestate, he was chargeable in his own right, and not in his representative capacity. (a¹) The more modern authorities have, however, established, that in several instances the executor may be sued, *as executor*, on a promise made by him as executor, and that a declaration founded on such a promise will charge the defendant no further than a declaration on a promise of the testator. (a²)

Thus, in *Dowse v. Coxe*, (b) the declaration stated that a cause

(a) [See *Forbes v. Perrie*, 1 Harr. & J. 109.]

(a¹) See *Trewinian v. Howell*, Cro. Eliz. 91; *Hawkes v. Saunders*, Cowp. 289; *Jennings v. Newman*, 4 T. R. 348; [*Greening v. Sheffield, Minor* (Ala.), 276; *Adams v. Adams*, 16 Vt. 228; *Thomas J. in Luscomb v. Ballard*, 5 Gray, 405; *Fitzhugh v. Fitzhugh*, 11 Grattan, 300.]

(a²) [*Piper v. Goodwin*, 23 Maine, 251.

One joint administrator is solely liable for the debts contracted by him in the settlement of the estate. Such debts do not create a liability under the bond. *Taylor v. Mygatt*, 26 Conn. 184.]

(b) 3 Bing. 20; S. C. 10 Moore, 272.

depending in chancery, in which Thomas Biddle was a party, was referred to arbitration, and that it was one * of the terms of submission that in case either of the parties should die, the death was not to abate the reference; that Thomas Biddle died before the making of the award; that the arbitrator awarded that the executor should pay the plaintiff 225*l.* out of the assets of Thomas Biddle; and that, being so liable, the defendant, executor as aforesaid, *promised to pay*. And the court of C. B. held that the executor was not charged thereby personally, but as executor only, and that the judgment must be *de bonis testatoris*. (c)

So, in *Powell v. Graham*, (d) one count of the declaration stated a promise by the testator in his lifetime, that, in consideration the plaintiff would enter into his service as a nurse and housekeeper, and would continue to serve him till his death, his executor should, after his decease, pay the plaintiff 20*l.*, and then averred the defendant's liability as executor, and that in consideration thereof *the defendant promised to pay* the plaintiff that sum, whenever he, the defendant, as executor, should be requested so to do. And the court of C. B. held, that, upon this count, the defendant was not liable individually, but as executor only. And in the same case the court held, and it is now fully settled, that a count averring an account stated between the plaintiff and the defendant as executor, and that in consideration thereof *the defendant as executor promised to pay* the balance, does not charge him personally; but he may plead *plene administravit*, and the whole judgment which can be given in favor of the plaintiff is *de bonis testatoris*. (e) And it makes no difference whether the account be averred to have been stated of money due from the testator to the plaintiff, (f) or of money due from the defendant *as executor* to the plaintiff. (g)

*So it should seem that a count averring that the defendant, *as executor*, was indebted to the plaintiff for so much money, paid

(c) This judgment was reversed in K. B., but on a different ground, the court of error declining to give any opinion on this point. 6 B. & C. 255.

(d) 7 Taunt. 581; S. C. 1 B. Moore, 305.

(e) *Ashby v. Ashby*, 7 B. & C. 444; S. C. 1 Mann. & Ry. 180.

(f) *Secar v. Atkinson*, 1 H. Bl. 102;

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Ellis v. Bowen, Forrest Ex. Rep. 98. This is the common mode of declaring against executors to save the statute of limitations. 1 H. Bl. 105.

(g) *Powell v. Graham*, 7 Taunt. 580; *Ashby v. Ashby*, 7 B. & C. 444. But see *Rose v. Bowler*, 1 H. Bl. 108; 2 Saund. 117 *h*, note to *Coryton v. Lithebye*.

by the plaintiff to the use of the defendant, *as executor*, and that in consideration thereof the defendant, *as executor*, *promised to pay*, charges the defendant in his representative character only, and that he may plead *plene administravit* to it, and that the judgment ought to be *de bonis testatoris*. (*h*) For instance, suppose two persons are jointly bound as sureties, and the one dies, and the survivor is sued and obliged to pay the whole debt. In such case, if the deceased had been living, the survivor might have sued him for contribution in an action for money paid; and it should therefore seem that he is entitled to sue the executor of the deceased for money paid to his use as executor. (*i*) Again, a plaintiff may in many cases have an advantage in proceeding against the assets rather than against the executor personally; the executor in his individual capacity may be insolvent; in his character of executor he may have assets adequate to answer any claim; and when the money is paid to his use as executor, justice seems to require that the person who has made the payment should have the liberty of looking to the fund which the executor has in that character. (*k*)

But a count alleging that the defendant, *as executor*, was *indebted to the plaintiff for so much money *lent* by the plaintiff to the defendant, *as executor*, and that the defendant, in consideration thereof, *as executor*, *promised to pay*, charges him personally, and he cannot plead *plene administravit*, and the only possible judgment is *de bonis propriis*. (*l*)

And so it is of a count which charges that the defendant, *as*

(*h*) *Ashby v. Ashby*, 7 B. & C. 448, 449, 451, 452. This point was conceded by the counsel and the court in *Corner v. Shew*, 3 M. & W. 350.

(*i*) *Ashby v. Ashby*, 7 B. & C. 449, 451, 452, by Bayley J. and Littledale J. See, also, *Batard v. Hawes*, 2 El. & Bl. 287, 298, where these *dicta* were regarded as strong authority for holding, that if one of several co-contractors be compelled by suit to pay the whole debt, he may sue the executors of another of them, *who has died before payment* for contribution.

(*k*) 7 B. & C. 449. But it must not be understood that one who has paid off a debt of a testator, or advanced money to an executor to enable him to do so, can

follow the assets into the hands of another to whom the executor has aliened them. *Haynes v. Forshaw*, 11 Hare, 104, *ante*, 932, note (*e*).

(*l*) *Rose v. Bowler*, 1 H. Bl. 108; *Powell v. Graham*, 7 Taunt. 586. [Executors and administrators cannot bind the estate by their own contracts. On contracts made by them for necessary matters connected with the estate, they are personally liable. *Miller v. Williamson*, 5 Md. 219; *Pinkney v. Singleton*, 2 Hill (N. Y.) 343; *Sims v. Stilwell*, 4 Miss. (How.) 176; *Nehbe v. Price*, 2 Nott & McC. 328; *Jones v. Jenkins*, 2 McCord, 494; *M'Eldery v. M'Kenzie*, 2 Porter (Ala.), 33; *Underwood v. Millegan*, 8 Ark. 254.]

executor, was indebted to the plaintiff *for money had and received* by the defendant *as executor*, for the use of the plaintiff, and that in consideration thereof, the defendant, *as executor*, *promised to pay*; for to such a count *plene administravit* cannot be pleaded, and the judgment on it must be *de bonis propriis*. (m) But in *Ashby v. Ashby*, (n) Lord Tenterden said, that although he felt himself bound by the authorities on the point, yet if the matter were quite new, it might, perhaps, be as well to hold that a plaintiff might elect to treat the receipt of the money as an act done by the executor in his character of executor, and take his chance whether he would get paid out of the assets or not, and that if he elected so to treat it, then he must show that the money came into the defendant's hands because he was executor. And Bayley J. concurred in this opinion, and put the following case: "Suppose a bill payable to the testator were remitted from a foreign country, half the amount applicable to the personal use of the testator, and the other half to be paid over by him to some other person. Before the bill arrives, the testator dies, and his executor receives the money. It is possible that he may not have received advice as to the mode in which it is to be applied, until after he has applied it in the ordinary course of administration. He may be insolvent in his individual capacity; * and it would be hard that the party, under such circumstances, should not have his election to be paid out of the funds of the testator." The learned judge, however, proceeded to observe, that the authorities were so strong that he felt himself bound by them, although his reason was not convinced. (o)

(m) *Rose v. Bowler*, 1 H. Bl. 108; *Jennings v. Newman*, 4 T. R. 347; *Bridgen v. Parkes*, 2 Bos. & Pull. 424; *Powell v. Graham*, 7 Taunt. 585, 586; *Ashby v. Ashby*, 7 B. & C. 444; S. C. 1 Mann. & Ry. 180.

(n) 7 B. & C. 448.

(o) 7 B. & C. 450. But Littledale J. expressed his opinion that if the case were perfectly new, the defendant ought to be held personally liable upon the count in question, and observed that where an executor receives money to the use of a particular individual, it operates as a specific appropriation of that money belonging to the party, and he, in his individual capacity, must be liable for the money so re-

ceived, it having nothing to do with the accounts of the testator. 7 B. & C. 452, 453; [*Cronan v. Cotting*, 99 Mass. 334, 336.] Perhaps an illustration of this view may be found in *Churchill v. Bertrand*, 3 Q. B. 568, where an intestate had granted an annuity to the plaintiff, and, after his death, his administratrix procured it to be set aside for a defect in the memorial; and it was held that the consideration money for the annuity could not be recovered back as money had and received by the intestate for the use of the plaintiff. [A debtor transferred to the administratrix of the estate of his creditor acceptances of a third person, with directions to

Again, a count upon a promise by the defendant, *as executor*, for *use and occupation* after the death of the testator, has been held to charge the defendant personally, and not in his character of executor. (*p*) So a count alleging that the defendant, *as executor*, was indebted to the plaintiff for *goods sold and delivered* by the plaintiff to the defendant, *as executor*, at his request, or for *work done* and materials for the same used and provided by the plaintiff for the defendant, *as executor*, at his request, and that the defendant, *as executor*, promised to pay, charges the defendant in his personal and not in his representative character; for such a claim must necessarily be for debts due from the defendant in his own right, as no goods can be sold to or work performed for another in his representative character. (*q*) The common count *for interest* charges the executor personally; *for it alleges a forbearance *at his request*. But a count charging that the defendant is indebted *as executor* on a contract by the testator to pay interest as long as the debt should be forborne, charges him as executor only. (*r*)

In actions like those above mentioned, which are brought against an executor, in the character of executor, to recover the demand out of the testator's estate, a promise by the executor is a mere *nudum pactum*, if there were no assets. (*s*) But it is not necessary to aver in the declaration that the defendant had assets. (*t*)

apply the proceeds, or so much thereof as might be necessary, to discharge his indebtedness to the deceased. The administratrix brought suit on the acceptances in her representative capacity, recovered judgment, and out of the proceeds of the execution applied to the estate of the deceased a sum larger than was actually due from the debtor. It was held that she was responsible to the debtor in an action against her individually for the balance so misapplied, as money received by the defendant to the plaintiff's use. *Cronan v. Cotting*, 99 Mass. 334, 336. Colt J. said, in this case, "The fact that she described herself as administratrix in a suit upon these securities cannot affect the relation of these parties. She could only bind herself in this transaction. She had no power to bind the estate she represented.

The balance of the money collected, after paying the debt due from the plaintiff, was not assets of the estate in her hands; and the defendant is not liable for such balance in her representative capacity."

(*p*) *Wigley v. Ashton*, 8 B. & Ald. 101. But see *Atkins v. Humphrey*, 2 C. B. 654; *post*, pt. v. bk. II. ch. 1.

(*q*) *Corner v. Shew*, 3 M. & W. 350; [Thomas J. in *Luscomb v. Ballard*, 5 Gray, 405.] See *post*, 1787 *et seq.*, as to charging an executor for the expenses of the funeral.

(*r*) *Bignell v. Harpur*, 4 Ex. 773.

(*s*) 1 Saund. 210, c. 211, note (1) to *Forth v. Stanton*; *Pearson v. Henry*, 5 T. R. 8; *Rann v. Hughes*, 7 T. R. 350, note (*a*).

(*t*) *Powell v. Graham*, 7 Taunt. 580; *S. C.* 1 B. Moore, 305; *Dowse v. Cox*, 3

2dly. It is now proposed to investigate the personal responsibility of an executor or administrator, arising from his own contracts.

2. Of the personal liability of an executor on his own promise :

A promise by an executor or administrator to pay a debt of the testator, or to answer damages, will not make him personally liable, unless there be a sufficient consideration to support the promise. For a bare promise by the executor does not make him liable out of his own estate, but he is still chargeable only as executor, and to the extent of the assets in his hands, in the same manner as he would have been had no such promise been made. (u) And by the statute of frauds the executor or administrator will not be liable unless the promise is in writing. It is clear, however, that although the promise be in writing, it is of no more effect since the statute than before, unless it be by deed, or there be a good consideration for it. (x) Hence, since

Bing. 20; S. C. 1 B. Moore, 272. See, also, Pinchon's case, 9 Co. 90 b; [Templeton v. Bascom, 33 Vt. 132. In this case it was decided that where the defendant, being sole heir to an estate, promised the plaintiffs, who had a valid and an undisputed claim against the estate, that if they would take no steps to enforce such claim he would pay it very soon, or upon request, the promise was valid, and not within the statute of frauds, not being founded upon the consideration of the debt of the deceased, but upon forbearance.]

(u) Reech v. Kennegal, 1 Ves. sen. 126; [Byrd v. Holloway, 6 Sm. & M. 199; Hester v. Wesson, 6 Ala. 415; M'Elwee v. Story, 1 Rich. (S. Car.) 9; Taliaferro v. Robb, 2 Coll. 258.]

(x) [Hester v. Wesson, 6 Ala. 415; Walker v. Patterson, 36 Maine, 273; Winthrop v. Jarvis, 8 La. Ann. 434; Beatty v. Tete, 9 La. Ann. 130; Bank of Troy v. Topping, 9 Wend. 273; Mosely v. Taylor, 4 Dana, 542; Sidle v. Anderson, 45 Penn. St. 464; Ciples v. Alexander, 2 Treadw. (S. Car.) Const. 767; Davis v. French, 20 Maine, 21; Douglas v. Fraser, 2 McCord Ch. 105; Taliaferro v. Robb, 2 Call, 258. But where an administrator gives his own obligation for a claim

against the estate, it is held to be an admission of assets. Thompson v. Maugh, 3 Iowa, 342. And where the promise of the administrator is in consideration of assets, it will support a judgment *de bonis testatoris*. Faxon v. Dyson, 1 Cranch C. C. 441; Dixon v. Ramsay, 1 Cranch C. C. 472. See Bank of Troy v. Topping, 13 Wend. 557. If an executor makes a written contract, founded upon a sufficient consideration, to pay a debt due from his testator, an action thereon may be maintained against him personally, although the contract was signed in his representative capacity. Walker v. Patterson, 36 Maine, 273; Ellis v. Merriman, 5 B. Mon. 296; Carter v. Thomas, 3 Ind. 213. In Davis v. French, 20 Maine, 21, 23, Shepley J. said: "The true doctrine upon this subject appears to be that where the cause of action existed against the deceased, the executor or administrator may make himself personally liable, by a written promise, founded upon a sufficient consideration. And in such case the action should be brought against him in his own right, if the plaintiff would have judgment against him in preference to one against the estate. A promise from the executor or administrator, as such, to pay a debt due from the deceased, may be alleged in

* the statute, there are two things necessary for the validity of the promise of the executor or administrator to pay the debt of the testator, or answer damages, out of his own estate: 1st, the common law requires that there should be a sufficient consideration to support the promise; 2d, the statute adds a still further requisite, that the promise should be in writing. (y) It is therefore expedient to examine, in the first place, what is a valid consideration for a promise by an executor or administrator to charge him *de bonis propriis*; and then to inquire what is a reduction of the promise into writing, sufficient to satisfy the statute of frauds.

Before entering upon this inquiry, it may be remarked, that a promise by an *administrator*, by word of mouth, made *before* administration granted, may, under certain circumstances, be binding upon him afterwards. Thus, in *Tomlinson v. Gill*, (z) a person promised the widow of an intestate, that if she would permit him to be joined in the letters of administration, he would make good any deficiency of assets to discharge the intestate's debts. And Lord Hardwicke held that this promise was not within the statute of frauds, because the party promising was not administrator at the time of making the promise; and it was no answer to say that he was administrator afterwards. (a) His lordship further held that this was an engagement which could be made

an action brought against him as executor or administrator, and in such case the judgment must be *de bonis testatoris*. But the executor or administrator cannot create a debt against the deceased. And it is immaterial how clearly the intent to do so may be expressed; for having no power to bind the estate he only binds himself by such a contract. And there can, therefore, be no judgment *de bonis testatoris*, and the action should be brought declaring against him in his own right. *Barry v. Rush*, 1 T. R. 691; *Sumner v. Williams*, 8 Mass. 199; *Myer v. Cole*, 12 John. 349." The statute has made no alteration in the pleading, and consequently it does not appear upon the declaration whether there was a promise in writing or not. It is a matter of evidence only. *Anon.* 2 Salk. 519; *Williams v. Leper*, 3 Burr. 1890, by Yates J.

(y) *Rann v. Hughes*, 4 Bro. P. C. 27,

Toml. ed.; S. C. 7 T. R. 350, note (a); *Hawkes v. Saunders*, Cowp. 289; *Philpot v. Briant*, 4 Bing. 717; S. C. 1 M. & P. 754; [*Simpson v. Patten*, 4 John. 422; *Jackson v. Raynor*, 12 John. 291; *Nelson v. Boynton*, 3 Met. 396; *Loomis v. Newhall*, 15 Pick. 166; *Stone v. Symmes*, 18 Pick. 467; *Dodge v. Burdell*, 13 Conn. 170; *Elliott v. Giese*, 7 Harr. & J. 457; *Leonard v. Vredenburg*, 8 John. 29; *Bailey v. Freeman*, 4 John. 280; *Clark v. Small*, 6 Yerger, 418; *Cobb v. Page*, 17 Penn. St. 469; 1 Chitty Contr. (11th Am. ed.) 740, and notes (n⁵) and (n⁶); *Robinson v. Lane*, 14 Sm. & M. 161.] But see *Herbert v. Powis*, 1 Bro. P. C. 355, Toml. ed.

(z) Ambl. 330.

(a) See *ante*, 405, 406, 629, 630, as to the difference between the relation of probate and letters of administration to the death of the testator and intestate.

good only in a court of equity; because it was not made to the creditors, who could, therefore, claim only through the widow; but that they were entitled in equity to the performance of the promise made to her; because it was to be considered there as made to her in trust for them. (b)

* 1st. What is a valid consideration. If a creditor, at the request of an executor, *forbears* to sue him, that is considered a sufficient consideration to charge him *de bonis propriis*, whether he has assets or not at the time of the promise; and therefore it is not necessary to aver in the declaration that he had assets. As if A., to whom the testator was indebted, comes to the executor, and says that he intends to sue him for the debt, whereupon the executor promises, in consideration that the plaintiff will forbear him for a reasonable time, to pay him, and A. accordingly forbears to sue him for a reasonable time, that is a good consideration to charge the defendant, in an action upon the case, out of his own estate, without assets; for by this promise it is intended as well to forbear to sue the executor, as to forbear the debt; and a forbearance of a suit is a good consideration, without assets at the time of the promise. (c) So

what is a
sufficient
considera-
tion for his
promise:

(b) This case was recognized by Lord Northington in *Griffith v. Sheffield*, 1 Eden, 77; and by Sir W. Grant in *Gregory v. Williams*, 3 Meriv. 590. A promise, however, by a party who is neither the executor nor administrator, to pay a debt of a deceased person, is merely *nudum pactum*; and even if such a party should give his promissory note to the creditor for the debt, without any other consideration for making it, the payment of the note cannot be enforced by the payee, if at the time of the making thereof there was no personal representative of the debtor. *Nelson v. Serle*, 4 M. & W. 795, overruling *Serle v. Waterworth*, Ib. 9; *ante*, 262, note (g). If, indeed, the note be made payable at a future date, and the maker be entitled to take out administration, as being the widow or next of kin of the debtor, perhaps the creditor might enforce the note, because the effect of giving it is to preclude the payee, during its currency, from suing the maker, in case the latter should take out administration. 4 M. &

W. 9. Where a widow gave a promissory note "for value received by my late husband," it was held that the note was valid on the face of it. *Ridout v. Bristow*, 1 Cr. & Jerv. 231, *post*, 1781, note (o). [Where a party, who was sole heir to an estate, promised certain creditors, who had a valid claim against the estate, that if they would not attempt to enforce such claim he would pay it very soon, or upon request, the promise was held valid and not within the statute of frauds, as not being founded upon the consideration of the debt of the deceased, but upon forbearance. *Templeton v. Bascom*, 33 Vt. 132. But see *ante*, 1776, 1777, and cases in note (y).]

(c) [*Templeton v. Bascom*, 33 Vt. 132;] *Johnson v. Whitchcott*, 1 Roll. Abr. 24, tit. Action sur Case, V. pl. 33, upon a demurrer, where the defendant pleaded that he had no assets when the promise was made. It is said in *Bane's case*, 9 Co. 94 a, that if there be no assets, it shall be given in evidence; but this opinion has

[1778]

if a man declares upon a promise against an administrator, that the intestate was *indebted to him in 10*l.* by bond, and died, and the defendant being his administrator, in consideration of the premises, and that the plaintiff *would spare him* till such a time after, promised to pay him the debt; and avers that he spared him till the time, and the defendant had not paid him, &c. though he did not say that he would spare him *the debt*, or to *sue him*, yet it shall be so intended, and therefore the consideration is good. (*d*) So it was said by Hale C. J. that though a bare accounting by the executor with a creditor of his testator will not bind the executor to pay *de bonis propriis*, yet a promise in consideration of forbearance will. (*e*) Also, where the plaintiff having a debt owing to him from the testator on a simple contract, the executor, in consideration the plaintiff would forbear to sue him until such a time, promised to pay, and the plaintiff averred that he did forbear accordingly, this is a good promise; but if the *heir* had promised, on forbearance of the suit, to pay this debt, no *assumpsit* would have been against him, because without consideration; for the heir is not chargeable to any debt without specialty. (*f*) So where in *assumpsit* the plaintiff declared that J. S. devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for the legacy, the defendant, in consideration of forbearance, promised to pay him; the defendant pleaded divers bonds and judgments, and no assets *ultra*; upon which the plaintiff demurred, and had judgment without argument; for it was not material whether he had assets or not; for he was charged upon his own promise, in consideration of forbearance; and a forbearance of a suit for a legacy was a sufficient consideration; although it was said, that if it had appeared by the declaration that the plaintiff had no cause of action, the forbearance would not be sufficient. (*g*) *It is true that it is now settled, that no action at law lies for a legacy, (*h*) but in this case the forbearance might

been overruled since. See the cases in the text, *supra*. [Mosely v. Taylor, 4 Dana, 542.]

(*d*) Gardener v. Fenner, 1 Roll. Abr. 15, tit. Action sur Case, S. pl. 3; Chambers v. Leversage, Cro. Eliz. 644.

(*e*) Hawes v. Smith, 2 Lev. 122.

(*f*) Fish v. Richardson, Yelv. 55, 56; S. C. Cro. Jac. 47.

(*g*) Davis v. Reyner, 2 Lev. 3; S. C. *nomine* Davis v. Wright, 1 Ventr. 120; 2 Keb. 758.

(*h*) Deeks v. Strutt, 5 T. R. 690. See *infra*, pt. v. bk. II. ch. I. [p. 1931, note (*k*¹); 1 Chitty Pl. (16th Am. ed.) 113, note (*h*), from which it appears that an action at law lies for a legacy in many of the American States.]

have been to sue in chancery, or, formerly, in the ecclesiastical court, for the legacy, and then the consideration may, perhaps, be a good one. (i) So if A. together with B. is bound to C. for the proper debt of B., and A. pays the money, and B. dies and makes D. his executor, and D., in consideration that A. will forbear to sue him until such a time, promises to pay him, this is sufficient consideration to support the promise. (k) So if an executor be indebted to J. S. in 100*l.*, who demands the money, the executor is chargeable only in respect of assets, and not otherwise; but if he promises to pay the debt *at a future day*, it becomes *his own debt*, and to be satisfied out of *his own estate*. (l) So B. having died indebted to G. for work and labor done, his executors signed the following memorandum on the back of G.'s account: "Mr. G. having consented to wait for the payment of the within account, we, as the executors of B., engage to pay Mr. G. interest for the same, at 5*l.* per cent., until the same is settled." And it was held that the executors were personally liable to pay the debt and interest. (m)

Accordingly, in a modern case, (n) two executors gave a promissory note to the plaintiff, in the following words, "*As executors to the late T. T., we severally and jointly promise to pay to N. C. the sum of 200*l.* on demand, with lawful interest for the same.*" And the court of C. B. held that they were personally liable on the instrument, upon the ground that the promise, from the circumstance of interest * being added, necessarily imported a pay-

(i) See 2 Saund. 137 *d*, note to Barber *v.* Fox.

(k) Scott *v.* Stevens, 1 Sid. 89.

(l) Goring *v.* Goring, Yelv. 11. See Reech *v.* Kennegal, 1 Ves. sen. 126.

(m) Bradly *v.* Heath, 3 Sim. 543.

(n) Childs *v.* Monins, 2 Brod. & Bing. 460; S. C. 5 Moore, 281. See, also, Barnard *v.* Pumfrett, 5 My. & Cr. 71; Lucas *v.* Williams, 3 Giff. 151. [In the case of Bank of Troy *v.* Topping, 9 Wend. 273, it was decided that administrators who have given a note for the debt of their intestate cannot be made personally responsible for its payment, unless it can be shown that they have assets, or that forbearance was the consideration of the note. That where it is not proved that

forbearance was the consideration of the note, the court will not infer such consideration from the mere fact that the note is payable at sixty days after date. This case came before the same court again, and appears reported in 13 Wend. 557. In this last hearing of the case it was determined that when a promissory note is given by an executor or administrator, it is *primâ facie* evidence of assets, because they are the legal consideration upon which the promise ought to be, and is presumed to be, founded; it is, however, but *primâ facie* evidence between the original parties, and the defendant may show that in fact there was a deficiency of assets, and of course no consideration to support the note.]

ment at a future day, and an executor promising to pay a debt at a future day makes the debt his own. (o)

Again, where the plaintiff declared in *assumpsit* that the defendant's testator was indebted to A., who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use, and that the defendant, in consideration that the plaintiff would accept the defendant as his debtor, promised to pay it to the plaintiff; it was held that this was not a sufficient consideration to support the promise, so as to charge the defendant *de bonis propriis*. (p) But if the promise had been in consideration of forbearance by such assignee of the debt to sue the executor or administrator, that would have been sufficient; (q) *for it is sufficient, in the case of any other debtor, whom the assignee of the debt forbears, at his request, to sue. (r)

So where the plaintiff declared in *assumpsit* that the husband of the defendant was indebted to the plaintiff in 50*l.* for beer, and died intestate, and administration was committed to the defendant, and that afterwards she, in consideration that the plaintiff would deliver to her six barrels of beer, promised to pay to the plaintiff, as well the 50*l.* due by the intestate as for the six barrels delivered to herself, and that he thereupon delivered the six barrels; it was held that the action was well brought against her on her own

(o) [Austin v. Monro, 47 N. Y. 360.] See, also, Ridout v. Bristow, 1 Cr. & Jerv. 231, where a widow had given a promissory note for "value received by my late husband;" and it was held that the note was valid on the face of it; and Bayley J. said: "If an administratrix takes upon herself to give a security, which may have the effect of inducing forbearance, and which purports to bind her individually, is it competent for her to say, you must prove assets? To my mind, the act of giving such a security supersedes the necessity of an investigation as to there being assets. It seems to me that the words 'value received by my late husband,' do not make the proof of assets necessary; and I go still farther and say that it was not competent for her to show that there were no assets." But where an executrix gave an acceptance for a debt, due from her testator, taking an engagement from the drawer to renew the bill from time to

time until sufficient effects were received from the estate of the testator, it was held that this meant sufficient effects in the ordinary course of administration; and that she had not precluded herself from first applying assets to pay 3,000*l.* to trustees for her own use, in discharge of a bond given by her husband before marriage to that effect, before she paid the acceptance. Bowerbank v. Monteiro, 4 Taunt. 844. Where a bill is indorsed to certain persons as *executors*, and they again indorse it, they become personally liable. Per Buller J. King v. Thom, 1 T. R. 489. See, also, as to signature in representative character, Alexander v. Sizer, L. R. 4 Ex. 102.

(p) Forth v. Stanton, 1 Saund. 210.

(q) Pitt v. Bridgwater, 1 Roll. Abr. 20, pl. 11; S. C. Hardr. 74; Russel v. Haddock, 1 Lev. 188; 1 Saund. 210, note (1).

(r) Reynolds v. Prosser, Hardr. 71; Oble v. Dittlesfield, 1 Ventr. 153; 1 Saund. 210, note (1).

assumpsit, and that the judgment should be for both debts *de bonis propriis*. (s)

So where an attorney delivered up deeds to an executor, which he was not obliged to do till his bill was paid, and these deeds were of great use to the executor in several suits which were then carrying on ; it was held that this was a sufficient consideration to make the executor liable to the attorney's whole demand, whether there were assets or not. (t)

It should seem that the having assets is a good consideration for a promise by an executor or administrator to pay a debt of the deceased, or to answer damages out of the executor's own estate. Thus, in *Reech v. Kennegal*, (u) Lord Hardwicke observed, "At law, if an executor promises to pay the debt of his testator, a consideration must be alleged ; *as of assets to come to his hands* ; or of forbearance ; *or if an admission of assets* is implied by the promise ; otherwise it will be but *nudum pactum*, and not personally binding upon the executor. (u¹) So it was held in *Atkins v. Hill* (x) and in *Hawkes v. Saunders*, (y) that the circumstance of the executor having assets sufficient to pay all the debts and * legacies, was a sufficient consideration to support a promise to pay a legacy, so as to render the executor individually liable on that promise in an action at law. (z) And although the doctrine of these cases, as far as the liability of an executor to be sued at law for a legacy, has been since exploded, (a) yet it should seem that their authority, with respect to the sufficiency of the consideration in question to support a promise to pay debts, remains unimpeached. The consequence is, that if an executor or administrator promises, in writing, that, in consideration of having assets, he will pay a particular debt of the testator or intestate, he may be sued on this promise in his individual capacity, and the judgment against him will be *de bonis propriis*. (b)

(s) *Wheeler v. Collier*, Cro. Eliz. 406.

(t) *Hamilton v. Incledon*, 4 Bro. P. C. 4 Toml. ed. [See *Hershaw v. Whitaker*, 1 Brev. (S. Car.) 9 ; 1 Chitty Contr. (11th Am. ed.) 740, 750, note (g), 756, note (e¹), 757 ; *Nelson v. Boynton*, 3 Met. 396 ; *Brightman v. Hicks*, 108 Mass. 246, 247, and cases cited.]

(u) 1 Ves. sen. 126.

(u¹) [See *Faxon v. Dyson*, 1 Cranch C. C. 441 ; *Dixon v. Ramsey*, 1 Cranch C.

C. 472 ; *Greening v. Brown, Minor* (Ala.), 553 ; *Sleighter v. Harrington*, 2 Taylor (N. Car.), 249.]

(x) Cowp. 284.

(y) Cowp. 289.

(z) See, also, accord. *Barnard v. Pumfrett*, 5 My. & Cr. 71, per Lord Cottenham.

(a) See *infra*, pt. v. bk. II. ch. I.

(b) *Trewinian v. Howell*, Cro. Eliz. 91. But see *Rann v. Hughes*, 7 T. R. 350,

It may here be observed, that in cases alike the above mentioned, where the nature of the debt is such as necessarily to make the defendant liable personally, the judgment will be *de bonis propriis*, although he be charged as promising *as executor*. (c)

It remains to consider, 2dly, What is a sufficient reduction into writing of the promise of an executor or administrator. The fourth section of the statute of frauds (29 Car, 2, c. 3), enacts (*inter alia*), "that no action should be brought, whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise to answer for the debt, default, or miscarriage of another person, &c. &c. unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing* and *signed* by the party to be *charged therewith, or some other person thereunto by him lawfully authorized."

The word "agreement" used in this section means the *consideration* of the promise; (d) and, therefore, it was held in the case of *Wain v. Warlters*, (e) that the *consideration* of the promise, as well as the promise itself, must be in writing, otherwise it is void. This doctrine was very much doubted in several subsequent cases, but has been fully established by subsequent decisions. (f) It is, however, sufficient, if the consideration can be gathered from the whole tenor of the writing; and it is not necessary that it should be stated on the face of it in express terms. (g)

note (a); [*Taliaferro v. Robb*, 2 Call, 258; *Templeton v. Bascom*, 33 Vt. 132. But where executors gave bond to pay, out of the assets, the balance due in settling the accounts of the estate, they were held not responsible beyond the assets which came into their hands. *Allen v. Gaffins*, 8 Watts, 397.]

(c) *Powell v. Graham*, 7 Taunt. 585; *Wigley v. Ashton*, 3 B. & Ald. 101; *Corner v. Shew*, 3 M. & W. 350. [See *Sneed v. Coleman*, 7 Grattan, 3.]

(d) 1 Saund. 211, note (2).

(e) 5 East, 10.

(f) *Saunders v. Wakefield*, 4 B. & Ald. 595; 1 Saund. 211, note (d). [In some of the American cases, the English doctrine,

in this respect, has been followed; but in other states the courts have rejected the English doctrine upon a judicial construction of the same language in their statutes. See 1 Chitty Contr. (11th Am. ed.) 91, 92, in note (a), 760, 761; *Sage v. Wilcox*, 6 Conn. 81; *Smith v. Ide*, 3 Vt. 290; *Packard v. Richardson*, 17 Mass. 122; *Bailey v. Freeman*, 11 John. 121. And now, in respect to guaranties in England, the consideration need not be expressed in writing, nor is it necessary that it should appear by necessary inference from a written document, under statute 19 & 20 Vict. c. 97, s. 3.]

(g) 1 Saund. 211, note (d). By stat. 19 & 20 Vict. c. 97 (Mercantile Law

This may be the proper place to consider how far an executor or administrator is liable upon a submission to arbitration of a claim upon him as the representative of the deceased. (*g*¹) Where the executor submits in broad terms, to pay whatever shall be awarded, and the arbitrator awards that he shall pay a certain sum, he is personally bound to perform the award, whether he has assets or not. (*h*) For if an executor or administrator thinks fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission. (*i*) Thus, in *Barry v. Rush*, (*k*) an action of debt was brought on a bond given by the defendant, by which he, as administrator, bound himself, * his heirs, &c. The condition, after reciting that the plaintiff and defendant had agreed to submit to arbitration certain disputes which had arisen between the plaintiff and the defendant's intestate, touching certain articles of agreement between the intestate and the plaintiff's testator, was for the performance of an award to be made by the arbitrators concerning the matters assigned, and also concerning all other matters, &c. between the said parties. The declaration stated that the arbitrator had awarded that the defendant, as administrator, should pay to the plaintiff, as executrix, 298*l.* on the 27th June following, and that the parties should execute general releases. The defendant pleaded *plene administravit*, and that at the time of entering into the bond, he had no assets. To this plea there was a demurrer. And the court of K. B. held that the plea was bad; on the ground that the bond was a personal engagement by the defendant to perform the award. So in *Worthington*

Personal
responsi-
bility of
executor
on a sub-
mission to
arbitration.

Amendment Act), s. 3, no special promise to answer for the debt, default, or miscarriage of another person shall be deemed invalid, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document.

(*g*¹) [By a well settled rule of the common law, executors and administrators have full authority to submit any disputed matter relating to the estate of a deceased person in their hands to arbitration. *Coffin v. Cottle*, 4 Pick. 454; *Bean v. Farnam*, 6 Pick. 269; *Chadbourn v. Chadbourn*, 9 Allen, 173; *post*, 1801, note (*i*¹); *Nel on*

v. Cornwall, 11 Grattan, 724. The award will be binding against him in his official capacity, and against the creditors, and against the legatees and distributees. *Wheatly v. Martin*, 6 Leigh, 62; *Marshall C. J. in Strodes v. Patton*, 1 Brock. 228; *Bean v. Farnam*, 6 Pick. 269.]

(*h*) See Lord Kenyon's judgment in *Pearson v. Henry*, 5 T. R. 7; [*Bean v. Farnam*, 6 Pick. 269; *Swicard v. Swicard*, 2 Treadw. (S. Car.) Const. 218.]

(*i*) By Lord Eldon in *Robson v. —*, 2 Rose, 50. See, also, *Wansborough v. Dyer*, 2 Chitt. Rep. 40.

(*k*) 1 T. R. 691.

v. Barlow, (*l*) where the arbitrator, under a reference between A., a claimant on the estate of an intestate, and B. the administrator, ascertained the amount of the demand, and directed that B. should pay it; it was held that B. could not afterwards object that he had no assets, but that he might be attached for non-payment. And Lord Kenyon said, that as the arbitrator had awarded the defendant to pay the amount of the plaintiff's demand, it was equivalent to determining, as between these parties, that the administrator had assets to pay the debt. So in *Riddell v. Sutton*, (*m*) an administratrix referred to the final award of an arbitrator certain disputes between the plaintiff and herself as executrix, to be finally settled by the said arbitration. The arbitrator found a balance due from the defendant to the plaintiff, and without finding assets, awarded her to pay it on or before a certain day. And the court of common pleas held that *plene administravit* was no bar to an action on the award. (*m*¹)

But the personal liability of the executor or administrator * may obviously depend, not only on the terms of the submission, but also on those of the award. Thus, in *Pearson v. Henry*, (*n*) the defendant, as administrator, submitted to an award, and the arbitrator awarded that a certain sum was due from the intestate's estate, *without awarding that the administrator was to pay it*. And it was held that the administrator was not thereby precluded from denying that he had assets. (*o*) So in *Love v. Honeybourne*, (*p*) a cause and all matters in difference between the plaintiff's testator and the defendant were referred to arbitration by a judge's order, and the arbitrator, upon an investigation of the accounts, ascertained that there was a certain balance against the testator, and, by his award, directed the plaintiff to pay that sum, *out of the assets*, on or before a certain day. The court was moved to

(*l*) 7 T. R. 453.

(*m*) 5 Bing. 200.

(*m*¹) [When a submission has been made by bond, the executor is liable, not only because the seal imports a consideration, but also because, when a person has executed an instrument under seal, he shall not be permitted to disprove the consideration. There is this distinction between a note and bond, — the consideration of the bond cannot be explained; that of the note may be, as between the original parties

and all parties having notice of the consideration. *Ten Eyck v. Vanderpoel*, 8 John. 120; *Shoonmaker v. De Witt*, 17 John. 304; *Bank of Troy v. Topping*, 9 Wend. 273; *Robinson v. Lane*, 14 Sm. & M. 161; *Peaseley v. Boatright*, 2 Leigh, 195.]

(*n*) 5 T. R. 6.

(*o*) See 7 T. R. 453; [*Walker v. Patterson*, 36 Maine, 273.]

(*p*) 4 Dowl. & Ryl. 814.

set aside this award for uncertainty, on the ground that the arbitrator had not ascertained whether there were any assets in the hands of the executor to pay the sum awarded. The court refused to set aside the award, on the ground that although in that respect it might be uncertain, yet that would not vitiate the other part of the award, which was unquestionably certain, namely, that part which found that the plaintiff, as executor, was indebted upon a balance of accounts to the defendant. But Lord Tenterden observed, that it appeared to him that the latter part of the award did not conclude the question of assets, but left it open. And Holroyd J. remarked that the arbitrator had awarded that the money should be paid by the plaintiff out of the assets, upon a day which he fixed, *i. e.* if there were any assets in his hands at that time; and that if the plaintiff had fully administered at that time, he would not be bound to pay. (*q*)

It was held by the court of K. B. in *Gardner v. Baillie*, (*r*) that a power of attorney from an executor, to ask, demand, sue for, and receive all sums due to him as executor, and to * do all further acts for receiving debts, &c. with power to do and act touching the premises as effectually as the principal could do, does not authorize the attorney to bind his principal by accepting bills, for debts due from his testator. But in *Howard v. Baillie*, (*s*) the court of common pleas inclined to hold that a letter of attorney given by an executor to A. enabling him to transact the affairs of the testator, in the name of the executor, as executor, and to pay, discharge, and satisfy all debts due from the testator, conveyed a sufficient authority to A. to accept a bill of exchange, in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, so as to make the executor personally liable. And clearly, if the executor admits that such a bill, which has been so accepted by A. with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to A. to accept that particular bill; without resorting to the letter of attorney. (*t*)

Liability of executor for acts done under his power of attorney.

(*q*) See, also, *In re Joseph & Webster*, 1 Russ. & My. 486. [For American cases in this point, see *McKeen v. Oliphant*, 3 Harrison, 442; *Tallman v. Tallman*, 5 Pick. 325; *Bean v. Farnam*, 6 Pick. 269; *Strodes v. Patton*, 1 Brock. 228; *Wheatley v. Martin*, 6 Leigh, 62; *Dickey v.*

Sleeper, 13 Mass. 244; *Chadbourn v. Chadbourne*, 9 Allen, 173; *Bennett v. Pierce*, 28 Conn. 315.]

(*r*) 6 T. R. 591.

(*s*) 2 H. Bl. 618.

(*t*) *Ib.*

With respect to the liability of an executor or administrator to the expenses of the funeral of the deceased, it appears to be clear, that if an executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party, who has given such orders, he makes himself liable individually, and not in his representative character, for the reasonable expenses. (u)

And notwithstanding that, generally speaking, an administrator is not bound, as such, by his acts done before the letters of administration were obtained, (x) yet it should seem that if, before taking out letters, he gives orders, or sanctions the orders which another person has given, for the funeral of the deceased, he will be thereby bound, after he has become administrator, to satisfy the charges incurred under such orders. (y)

* A question, however, of some difficulty arises, in cases where the executor or administrator has neither given nor adopted any directions for the burial, but he is sought to be charged on an implied contract arising out of his situation, with reference to his character and the estate of the deceased. (y¹) According to one report of the case of *Ashton v. Sherman*, (z) Lord Holt laid down that "if A. employs B. to work for C. without warrant from C.,

(u) *Brice v. Wilson*, 8 Ad. & El. 349, note (c); *S. C.* 3 Nev. & M. 512; *Corner v. Shew*, 3 M. & W. 350; [*Trueman v. Tilden*, 6 N. H. 201; *Thomas J. in Luscomb v. Ballard*, 5 Gray, 405, 406. An action cannot be maintained against the estate of the deceased on a contract made by the administrator, having assets in his hands, for the funeral expenses of the deceased. *Ferrin v. Myrick*, 41 N. Y. 315.]

(x) See *ante*, 405, 407.

(y) *Lucy v. Walrond*, 3 Bing. N. C. 841. In this case, the action was sustained against the defendant in his character as administrator; but the point, as to whether he could be properly sued otherwise than individually, was precluded by the circumstance of the defendant having paid money into court.

(y¹) [In *Hapgood v. Houghton*, 10 Pick. 154, 156, Putnam J. said: "The estate in the hands of the executor is bound by law for the payment of the expenses of the decent interment of the deceased. It is just as liable for the coffin and other nec-

essary charges of the funeral, as for necessary supplies in the lifetime. We are all clearly of opinion that the law raises a promise on the part of the executor or administrator to pay the funeral expenses, so far as he has assets. If the defendant has no assets, he should plead that matter in bar." In another case, it was held that where a person, being at a distance from home, sent for his wife and other relatives, and they went to see him, but did not arrive until after his death, and his executor paid the expenses of his journey, the executor was allowed to charge the same in his account of his administration. *Jennison v. Hapgood*, 10 Pick. 77; *ante*, 968 *et seq.* and notes; *post*, 1852, note (p). See *Campfield v. Ely*, 1 Green, 150; *Parker v. Lewis*, 2 Dev. Eq. 21; *Palmer v. Stevens*, R. M. Charl. 56; *Gregory v. Hooker*, 1 Hawks, 394; *France's Estate*, 75 Penn. St. 220; *Thomas J. in Luscomb v. Ballard*, 5 Gray, 405.]

(z) *Holt*, 309.

A. is liable to pay for it; an executor is not liable to pay for funeral expenses unless he contracts for them." This *dictum* is not mentioned by the other reporters (*a*) of the same case; and indeed, from the nature of the facts, it is difficult to see how the remark could have been introduced into the discussion. But an anonymous case is to be found in the twelfth volume of modern reports, (*b*) which contains the mere statement that "an executor is not liable to pay for funeral expenses, without he contracts for it." And this probably is but a reference to the *dictum* of Lord Holt, inserted in the report of *Ashton v. Sherman*. Recent decisions, although the propriety of them has been much questioned, (*c*) must be considered as having overruled this doctrine; and it seems now established, that, in the absence of evidence to charge any other individual, an executor *with assets* is answerable, in point of law, without any express contract, for the funeral expenses of his testator, suitable to his degree. (*d*) Thus, in *Tugwell v. Heyman*, (*e*) Lord Ellenborough held that if executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable, upon an implied * promise, to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances. So in *Rogers v. Price*, (*f*) it appeared that the testator died in Wales, at the house of his brother, who thereupon sent for the plaintiff, an undertaker residing at a distance. The plaintiff afterwards furnished the funeral, and the brother of the deceased attended it as chief mourner. It was admitted that the funeral was suitable to the degree of the deceased. There was no evidence of any contract made by the defendant, or that he knew of the funeral until it had

(*a*) 1 Ld. Raym. 263; Carth. 429; 12 Mod. 153; Comberb. 444, 449.

(*b*) P. 256.

(*c*) See 3 M. & W. 356.

(*d*) See the remark of Bayley J. in *Hancock v. Podmore*, 1 B. & Ad. 262; and of Jervis C. J. in *Ambrose v. Kerri-son*, 10 C. B. 779. [This subject is very fully treated, and the cases cited and reviewed, in *Patterson v. Patterson*, 59 N. Y. 574, 582-586, where it is held that the duty of giving decent burial to a deceased testator who leaves some estate, devolves upon his executor; the necessary and rea-

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sonable expenses thereof are a charge upon the estate, and have a preference over all debts against it as a part of the expenses of the trust; and the law implies a promise on the part of the executor to pay one who, in the absence or neglect of the executor, from the necessity of the case, incurs and pays such expenses. See *Fitzhugh v. Fitzhugh*, 11 Grattan, 300; *Hapgood v. Houghton*, 10 Pick. 154; *ante*, 968 *et seq.*; *Adams v. Butts*, 16 Pick. 344, 346.]

(*e*) 3 Campb. 298.

(*f*) 3 Y. & Jerv. 28.

taken place. But the court of exchequer held that, assuming him to have assets, he was liable, upon an implied promise, to pay the expenses of the burial. (*f*¹)

However, it was said by Patterson J. in *Brice v. Wilson*, (*g*) that "it has been decided by several cases that an executor is liable upon an implied promise, at common law, to pay reasonable expenses for the funeral of his testator, *where no other person is liable upon an express contract*, although he does not give orders for it. But there is no case which goes the length of deciding that if the funeral be ordered by another person to whom credit is given, the executor is liable." In that case the testator's widow ordered an extravagant funeral without the knowledge of the executor, who, however, was present at the funeral, and did not object to it as extravagant. The undertaker, in his bill, charged the widow, but subsequently applied for payment to the executor, who promised to pay. An action was brought against the executor in his own right, in which he suffered judgment by default. And it was held that the defendant was liable to the whole amount of the reasonable charges for the funeral as ordered by the widow; not, it must be observed, on the ground of a common law liability of the defendant as executor, but on the ground of his having rendered himself liable by adopting the acts of the widow, *and treating her as his agent. (*h*) But the learned judge in this case probably intended to lay down no more than that the executor, where credit has been given to another person, is not liable *to the undertaker*; for it should seem, that if the person, who gives the order for the funeral, pays for it, he may have an action against the executor for the reasonable expenses. Accordingly, it was held in *Green v. Salmon*, (*i*) that in an action (brought before Lord Denman's act, making interested witnesses competent) by an undertaker for funeral expenses, against a person not the executor, a residuary legatee was a competent witness

(*f*¹) [*Trueman v. Tilden*, 6 N. H. 201; *ante*, 1788, note (*y*¹). But it has been held that a person who, of his own accord, buries the deceased, cannot recover for the expenditures, of the personal representatives, without giving previous notice of them. *Gregory v. Hooker*, 1 Hawks, 394.]

(*g*) 3 Nev. & M. 512; S. C. 8 Ad. & El. 349, note (*c*). [See *Thomas J. in Lushcomb v. Ballard*, 5 Gray, 405.]

(*h*) See *Walker v. Taylor*, 6 C. & P. 752; [*France's Estate*, 75 Penn. St. 220, 224, 225.]

(*i*) 8 Ad. & El. 348; S. C. 3 Nev. & P. 388.

for the plaintiff. For although a person, other than the executor, might have rendered himself liable to the under taker, the estate was ultimately answerable for so much of the cost as an executor might reasonably pay, and no more; and the witness, therefore, had no disqualifying interest. (*j*)

These authorities do not involve the decision of the question whether, in an action on the promise implied by law on the part of an executor to pay for the funeral of his testator, the judgment should be *de bonis propriis* or *de bonis testatoris*, or consequently whether *plene administravit* is a good plea. (*j*¹) It should seem, however, that the naming the defendant executor in the declaration is surplusage, and that he is liable *de bonis propriis*, if liable at all; (*k*) but that, since the maintenance of the action is dependent on the fact of his being an executor *with assets*, it is a good defence, under the general issue, that his testator left none. And accordingly, in a modern case, (*l*) the court of exchequer held that the only point really determined, by *Tugwell v. Heyman*, and *Rogers v. Price*, was that the law implies a * contract on the part of an executor, who has assets, *personally*, and not in his *representative character*; inasmuch as the implied promise cannot place the defendant in a different condition than if he had made an express contract to the same effect; which certainly would have bound him personally only. (*l*¹)

With respect to the liability of an executor or administrator carrying on the trade of the deceased, the general principle is, that a trade is not transmissible, but is put an end to by the death of the trader. Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the court of chancery, they run great risk, even although the will contains a direction that they should continue the business of the de-

Liability of executor continuing the trade of testator.

(*j*) But an heir-at-law who has voluntarily paid the funeral expenses of an intestate cannot claim to have them refunded out of the intestate's personal estate. *Coleby v. Coleby*, 12 Jur. N. S. 496, *coram* Stuart V. C.

(*j*¹) [See *ante*, 1788, note (*y*¹); *Campfield v. Ely*, 1 Green, 150; *Putnam J. in Hapgood v. Houghton*, 10 Pick. 156.]

(*k*) See *Hayter v. Moat*, 2 M. & W. 56; [*Ferrin v. Myrick*, 41 N. Y. 315.]

(*l*) *Corner v. Shew*, 3 M. & W. 350.

(*l*¹) [In an action against an executor or administrator on his own contracts and engagements, though made for the benefit of the estate, the judgment is *de bonis propriis*, and he is to answer it with his own personal property. *Seip v. Drach*, 14 Penn. St. 352.]

ceased. (*m*) The case of an executor or administrator, in this respect, is very hard. For, if the trade be beneficial, the profits are applicable to the purposes of the trust, and the executor or administrator derives no personal benefit from the success. If, on the contrary, the trade prove a losing concern, the executor, on failure of assets, will be personally responsible for the debts contracted in the business since the testator's death, to the extent of all his own property; also, in his person; and he may be proceeded against as a bankrupt though he is but a trustee. (*n*) Accordingly, in a case (*o*) where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter, the court of K. B. held that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt; although their names were * not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits to themselves. (*p*)

It is, therefore, obvious, that where partners covenant that they and their respective executors and administrators will continue partners for a certain term of years, and one of them dies before the term has expired, his executors or administrators cannot be compelled to become partners personally, (*q*) though the cove-

(*m*) *Barker v. Barker*, 1 T. R. 295; *Ex parte Garland*, 10 Ves. 119.

(*n*) *Ex parte Garland*, 10 Ves. 119; *Ex parte Richardson*, 1 Buck, 209; [*Alsop v. Mather*, 8 Conn. 584; *Muntz v. Brown*, 11 La. Ann. 472; *Stedman v. Fiedler*, 20 N. Y. 437; *Thompson v. Brown*, 4 John. Ch. 619; *Ames v. Downing*, 1 Bradf. Sur. 321.] If a firm in which the will authorized the employment of the assets becomes bankrupt, no proof can be made against the estate of the bankrupts in respect of the money so employed. *Scott v. Ison*, 34 Beav. 434.

(*o*) *Wightman v. Townroe*, 1 M. & Sel. 412.

(*p*) See, also, accord. *Labouchere v. Tupper*, 11 Moore P. C. 198; in which case Lord Justice Knight Bruce further laid down that the executor is personally lia-

ble, as above stated, though he carries on the trade avowedly as executor, and whether he is entitled or not entitled to be indemnified out of the testator's personal estate, and whether it is sufficient or insufficient for the purpose, and notwithstanding the testator was bound by a covenant with his partner to continue the trade in partnership. His lordship also pointed out that the propriety of his executor's conduct, as between himself and those beneficially interested in the testator's personal estate, cannot give the creditors of the trade, becoming so after the death, the rights of creditors of the testator. See, further, *In re Leeds Banking Company*, L. R. 1 Ch. App. 231.

(*q*) *Downs v. Collins*, 6 Hare, 418, 438; *ante*, 1658, note (*o*).

nant is binding on the estate of the deceased partner in their hands. (r)

If an executor, without any authority from the will, (s) take upon himself to trade with the assets, the testator's estate will not be liable in case of his bankruptcy; the *testator's creditors and legatees will have a right to prove demands for such of the assets as have been wasted by the executor in the trade, in proportion to their respective interests; and with respect to such of the assets as can be specifically distinguished to be a part of the testator's estate, they will not pass to the assignees; the executors holding them *alieno jure*, they will not be liable to his bankruptcy. (t)

Again, the testator may, by his will, qualify the power of his executor to carry on trade, and limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose; and then, in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation. (u) Accordingly, in *Cutbush v. Cutbush*, (v) a testator directed his widow to carry on his business, until his youngest child should attain twenty-one; and for that purpose, gave her the "entire use, disposal, and management of the capital, stock, and effects which should be in, due, and owing, or belonging to him in his said trade," at the time of his de-

(r) *Ib.* See, also, the cases collected, *ante*, 1748, note (b), as to the executors of deceased shareholders in public companies. If such an executor purchases further shares, he is, of course, personally liable in respect of these. *Spence's case*, 17 Beav. 203.

(s) In *Kirkman v. Booth*, 11 Beav. 273, 280, Lord Langdale said it was a rule without exception, that to authorize executors to carry on a trade, or permit it to be carried on with the assets, there ought to be the most distinct and positive authority and direction given by the will for that purpose. See, further, as to what shall constitute such an authority and direction, *Travis v. Milne*, 9 Hare, 141. ["A testator may doubtless subject his estate to liability for debts contracted after his death by a partnership of which he has been a member. But such liability can be

created only by clear provisions of the will, or unambiguous acts of the executors or trustees under the authority thereby conferred upon them. *Ex parte Garland*, 10 Ves. 110; *Burwell v. Mandeville*, 2 How. (U. S.) 560; *Stanwood v. Owen*, 14 Gray, 195." *Gray J. in Bacon v. Pomeroy*, 104 Mass. 583. But if an executor, without authority from the will, or an administrator, trade with the stock, he will be liable to the creditors of the estate for its full value. *Wood's Estate*, 1 Ashm. 314.]

(t) *Ex parte Garland*, 10 Ves. 110; *Toller*, 487; *Ex parte Richardson*, 1 Buck, 202; *ante*, 637.

(u) *Ex parte Garland*, 10 Ves. 110; *Toller*, 487; *Ex parte Richardson*, 1 Buck, 202; *Thompson v. Andrews*, 1 My. & K. 116.

(v) 1 Beav. 184.

cease; and he authorized his executors to augment the capital employed therein. The executors renounced, and the widow took out administration. And Lord Langdale M. R. held that the specified property of the testator only (and not his general assets) was liable to the debts contracted by the widow in carrying on the trade. (*x*)

* Where an executor of a trader only disposes of his testator's stock, it will not constitute him a trader, even though he buy ingredients to make it marketable; but if the executor increases the stock and continues to sell, he becomes a trader. The distinction is that if an executor or administrator only buys with an intent of selling the testator's stock as soon as it can conveniently be done, he would not be considered a trader; but if he carries on the trade with an intent of continuing it definitely, and to make a general profit for the benefit either of himself or of those beneficially entitled to the stock, he clearly would be a trader. (*y*)

Thus, where the executor of a wine cooper found it necessary to buy wines to refine the stock left by the testator, this was held not to constitute him a trader. (*z*)

It must be observed, that when the law speaks of executors not carrying on the business of their testator, it means that they are not to buy and sell. There are many cases when executors not only may, but are bound to continue the business to a certain extent. Thus, if a party contracts for himself and his executors to build a house, and dies, the executors must go on, or they will be liable in damages for not completing the work. (*a*) So if a party engages to build a house, and dies, after having procured all the necessary materials, it should seem that his executors ought to complete the work, and not dispose of the materials at a loss to the estate. (*b*) Again, if a bookseller undertakes to publish a

(*x*) A direction in a will, that the testator's trade shall be carried on, does not of itself authorize the employment in the trade of more of the testator's property than was employed in it at his decease; nor does such a direction, coupled with a direction that the testator's debts shall be paid, authorize a mortgage of his real estate, not employed at his death in the trade, for the purposes of carrying it on. *M'Neillie v. Acton*, 4 De G., M. & G. 744.

(*y*) *Eden*, Bankr. 5.

(*z*) *Toller*, 487. [But it has been held that an executor or administrator is liable personally for the payment for goods purchased by him for the use and benefit of the estate of the deceased. *Harding v. Evans*, 3 Porter, 221; *Lovell v. Field*, 5 Vt. 218.]

(*a*) *Marshall v. Broadhurst*, 1 Cr. & Jerv. 405; *S. C. Tyrwh.* 350; *ante*, 1724.

(*b*) 1 Cr. & Jerv. 405. See, also, *Edwards v. Grace*, 2 M. & W. 190.

work in parts, and, before the completion, he dies, a subscriber has a claim upon the estate to complete the work ; for otherwise those parts which he has purchased, upon the faith of the work being completed, are useless. So if a man makes half a wheelbarrow, or half a pair of shoes, and dies, the executors may complete them, and they are not bound to sacrifice the property of their testator by selling articles in an imperfect * state. (c) So if the deceased died possessed of a manufactory, his executors, it should seem, would be justified in continuing the works for a reasonable time, if this should be requisite for the purpose of selling the machinery and premises to advantage ; and they will not, at least in equity, be charged with any loss sustained in employing the assets in so continuing the trade, if they act *bond fide*, and according to the best of their judgment. (d)

It may here be mentioned, that if executors, who are by the testator's will to carry on his trade for the benefit of his family, suffer a person to conduct the trade in his own name, such person may bring actions in his own name for goods sold by him, though afterwards accountable to the executors. (e)

In a modern case, (f) connected with this subject, the facts were, that A., the widow and administratrix of B., continued B.'s trade after his decease. B., at his death, was indebted to C. on the balance of an account. A. continued to receive goods from and to make payments to C. as B. had done, and she was charged in account by C. with the debt. The payments made by her to C. exceeded the debt ; but a balance was ultimately due to C. And it was held that B.'s debt was discharged by A.'s payments,

(c) 1 Cr. & Jerv. 405. See *Dakin v. Cope*, 2 Russ. 170.

(d) *Garrett v. Noble*, 6 Sim. 504. See also, accord. *Collinson v. Lister*, 20 Beav. 356, 365, 366, by Romilly M. R. ["An administrator who, in a particular transaction, acts in good faith, under the direction of all the personal representatives who are interested in the estate, is to be protected, in rendering his accounts in the probate court, from a claim on the part of such representatives that he has not administered strictly according to law in respect to such transaction. He may prosecute or defend suits, compromise claims upon the estate, or deal with the assets in a particular way,

not usual or strictly legal ; as by continuing the estate in business ; and the personal representatives by whose request or assent it has been done, will not be permitted to charge him with mal-administration ;" *Colt J. in Poole v. Munday*, 103 Mass. 176, 177 ; and so, in this case, it was decided that an administrator may be allowed in his account for inventoried property which he has spent or consumed in carrying on in good faith, by the request of all parties interested in the estate, the business of the testator after his death.]

(e) *Wilkes v. Lister*, 6 Esp. 78.

(f) *Sterndale v. Hankinson*, 1 Sim. 393.

and that the ultimate balance could not be proved as a debt against B.'s estate.

* SECTION II.

Of the Liability of an Executor or Administrator in Respect of his own Tortious or Negligent Acts; and herewith of Devastavit; and of Executors' Accounts and Allowances.

It remains to investigate what shall amount to such a violation or neglect of duty by an executor or administrator, as shall make him personally responsible.

This species of misconduct is called in law a *devastavit*; that is, a wasting of the assets; and is defined to be, a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the duty imposed on them, for which executors or administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased. (*g*)

An executor is personally liable in equity for all breaches of the ordinary trusts which, in courts of equity, are considered to arise from his office. (*g*¹) And it may here be observed, that where personal property is bequeathed to executors, as trustees, the circumstance of taking probate of the will is, in itself, an acceptance of the particular trusts. (*g*²) Therefore, where the will contains express directions what the executors are to do, an executor, who proves the will, must do all which he is directed to do as executor, and he cannot say, that though executor he is not clothed with any of those trusts. (*h*)

(*g*) Bac. Abr. Exors. L. 1; [Edmundson v. Roberts, 2 How. (Miss.) 822.]

(*g*¹) [See Armstrong v. Cooper, 11 Ill. 560; Buchanan v. Pue, 6 Gill, 115; Somerset v. Somerset, 3 Gill, 276; Beall v. Hilliary, 1 Md. 189. If a legacy is given in trust, and no person is named as trustee, it belongs to the executor as such to administer the estate according to the provisions of the will. Groton v. Ruggles, 17 Maine, 137. Where, however, the testator appointed a person to be his sole executor, and bequeathed to him, his "executor and trustee," his property in trust, &c. it was held that the offices of executor and

trustee were distinct, and that the duties of the trust were not imposed upon him as executor, but were to be performed by him as trustee. Wheatley v. Badger, 7 Penn. St. 459. See Wilde J. in Tainter v. Clark, 13 Met. 220, 226, 227.]

(*g*²) [Worth v. M'Arden, 1 Dev. & Bat. Eq. 199.]

(*h*) Mucklowe v. Fuller, Jacob. 198; Booth v. Booth, 1 Beav. 125; Stiles v. Guy, 4 Y. & Coll. 571, 575; Williams v. Nixon, 2 Beav. 472; [Saunderson v. Stearns, 6 Mass. 37; Dorr v. Wainwright, 13 Pick. 328; Hall v. Cushing, 9 Pick. 395; Newcomb v. Williams, 9 Met. 534; Prior v. Talbot, 10

The general rule adopted, with respect to the liability of executors and administrators on this head, is founded upon two princi-

Cush. 1; *Carson v. Carson*, 6 Allen, 397, 399; *Dole v. Johnson*, 3 Allen, 364, 367; *Pettingill v. Pettingill*, 60 Maine, 411, 423; *Nutter v. Vickery*, 64 Maine, 490; *Groton v. Ruggles*, 17 Maine, 137; *Johnson J. in Chesnut v. Strong*, 1 Hill Ch. 124; *Metcalf J. in Holbrook v. Harrington*, 16 Gray, 102, 105; *Knight v. Loomis*, 30 Maine, 209; *Towne v. Ammidown*, 20 Pick. 535.] But where the same persons are appointed trustees and executors of a will, a revocation by the testator of their appointment as executors is not necessarily a revocation of their appointment as trustees. *Graham v. Graham*, 16 Beav. 550; *Cartwright v. Shepherd*, 17 Beav. 301; *Worley v. Worley*, 18 Beav. 58. [So, on the other hand, persons so appointed executors and trustees by the will may accept and qualify as executors and decline to act as trustees. And where bonds are required for the faithful performance of the duties of each office if the persons so appointed give bonds as executors, they will be deemed to have declined the office of trustees unless they give bonds in that capacity also. *Williams v. Cushing*, 34 Maine, 370. Where a person, appointed executor, and trustee of the residue of testator's estate, under a will, accepts the office of executor but declines to act as trustee, the probate court may appoint another person to take the place of such residuary trustee. *Williams v. Cushing*, 34 Maine, 370. But in Pennsylvania, where executors are declared trustees by a will, security can only be demanded as executors, the offices being inseparable. In *re Wilson's Estate*, 2 Penn. St. 325. Testamentary trustees are required by statute in Massachusetts, except in special cases, to give bonds to the judge of the probate court for the county in which the will is proved, for the faithful fulfilment of the duties of the office, before entering upon the performance of them. Genl. Sts. c. 100, § 1. See *Shaw v. Paine*, 12 Allen, 297. Trustees for charitable trusts need not give bonds. *Drury v. Natick*, 10 Al-

len, 169. A trustee in a will who neglects to give the bond required is considered as declining the trust. Genl. Sts. c. 100, § 4. See *Tainter v. Clark*, 13 Met. 220, 226; *Clark v. Tainter*, 7 Cush. 567; *ante*, 287, note (m). As to the liability of an executor who pays over a fund to a trustee named in the will to receive it, before such trustee has given the required bond, see *Newcomb v. Williams*, 9 Met. 525, 534, 535. Where the same person is appointed by the will executor and trustee, "if for greater convenience he wishes to close his account as executor, and open a new account as trustee, he must give bond in the capacity of trustee, and charge himself in one capacity, *eo instanti*, and by the same act by which he claims his discharge in the other." *Shaw C. J. in Prior v. Talbot*, 10 Cush. 1, 3; *Dorr v. Wainwright*, 13 Pick. 328. He is bound to account for the estate as executor, unless he has rendered an account in the probate office, charging himself as trustee, and that account has been allowed by the probate court. *Shaw C. J. in Conkey v. Dickinson*, 13 Met. 53; *Johnson v. Fuquay*, 1 Dana, 514. As to the time when, and the circumstances under which, a person who is named in the will as both executor and trustee, will be presumed to have closed his administration of the estate, and to hold as trustee, see *Lark v. Linstead*, 2 Md. Ch. 162; *Carrol v. Bosley*, 6 Yerger, 220; *Jennings v. Davis*, 5 Dana, 127; *Kirby v. Turner*, Hopkins, 309; *Drane v. Bayliss*, 1 Humph. 174. He is chargeable as executor for the property in his hands until he has given bond as trustee, and charged himself with the property as trustee. *Prior v. Talbot*, 10 Cush. 1; *Deering v. Adams*, 37 Maine, 269. He can only discharge himself as executor by charging himself as trustee. *Shaw C. J. in Treadwell v. Cordis*, 5 Gray, 359; *Minot v. Amory*, 2 Cush. 377. See *Swope v. Chambers*, 2 Grattan, 319. Where the same persons are both executors and trustees, "if, by the constitution of the trust,

ples: 1st. That, in order not to deter persons from * undertaking these offices, the court is extremely liberal in making every possible allowance, and cautious not to hold executors or administrators liable upon slight grounds. 2d. That care must be taken to guard against an abuse of their trust. (i)

Executors and administrators may be guilty of a *devastavit*, not only by a direct abuse by them, as by spending or consuming, or converting to their own use, (k) the effects of the deceased, but also by such acts of negligence and wrong administration as will disappoint the claimants on the assets. (l)

With respect to incurring the charge by plain and palpable acts of abuse, an example of this sort of *devastavit* may be afforded by recurring to a subject already considered, viz, the application of the assets to the satisfaction of the executor's own debt to a third party. (m) So, where the executor collusively sells the testator's goods at an undervalue, when he might have obtained a higher price for them, it is a *devastavit*, and he shall answer the real value. (n)

With regard to a *devastavit* arising from the mal-administration of the executor or administrator, the charge will be incurred by misapplying the assets in undue expenses for the funeral; (o) in the payment of debts out of their legal order, to

they were exempted from giving bonds, as they may be, it would probably be held sufficient — as no actual payment can be made to one's self—to show, by any authoritative and notorious act, that they had elected to act in the capacity of trustees; as, for instance, if they claim a credit in their executorship account, filed in the probate office, for a sum, held by themselves as trustees, and also file an inventory or account, charging themselves with the like sum as trustees." Shaw C. J. in *Newcomb v. Williams*, 9 Met. 584; *Hall v. Cushing*, 9 Pick. 395; *Elliott v. Sparrell*, 114 Mass. 404, 406. See *Miller v. Congdon*, 14 Gray, 114.]

(i) *Powell v. Evans*, 5 Ves. 843; *Raphael v. Boehm*, 13 Ves. 410; *Tebbs v. Carpenter*, 1 Madd. 298.

(k) [*Edmundson v. Roberts*, 2 How. (Miss.) 822.] A disposing of the goods of the testator to the executor's own use is no *devastavit*, if he pays the testator's debts to

the value, with his own money, in such order as the law appoints. *Merchant v. Driver*, 1 Saund. 307; Com. Dig. Admon. L. 2; ante, 647.

(l) Bac. Abr. Exors. L. 1.

(m) See ante, 937. [See *Camp v. Smith*, 68 N. Car. 537.]

(n) *Wentw. Off. Ex.* 302, 14th ed.; Bac. Abr. Exors. L. 1; *Rice v. Gordon*, 11 Beav. 265; [*Pinchard v. Woods*, 8 Grattan, 140; *Matter of Saltus*, 3 Abb. (N. Y.) App. Dec. 243. An executor who obtains a license to sell real estate upon a false representation of a deficiency of personal estate, and actually sells the same, is chargeable with mal-administration; and a devisee whose land is taken and sold under such license, may obtain redress against the executor and his sureties upon the bond, although the executor never received anything from the sale. *Chapin v. Waters*, 110 Mass. 195.]

(o) Ante, 968 et seq.

the prejudice of such as are superior; (*p*) or by an *assent to, or payment of a legacy, when there is not a fund sufficient for creditors. (*q*)

It must, however, be observed, that it is not a *devastavit* in an executor or administrator to pay a debt of an inferior degree, before one of higher, *of which he had no notice*. (*r*) And it has been doubted whether it is any *devastavit* to pay over the whole of the assets to the legatees or parties entitled in distribution, so as to leave nothing to satisfy a claimant for a valuable consideration, if the executor had no notice of the existence of the demand and a reasonable time elapsed, after the death of the testator, before the payment by the executor to the legatee, or next of kin. (*s*) But the modern authorities appear to establish that the mere circumstance of want of notice of a debt or claim against the estate of the deceased will not excuse the executor from the payment or satisfaction of it, if the assets were originally sufficient for that purpose, notwithstanding that, in ignorance of the existence of the debt or claim, he may have handed over the assets *bonâ fide* to legatees or parties entitled in distribution. (*t*)

If the executor surrenders, or otherwise fails to preserve the

(*p*) *Ante*, 989 *et seq.*; [*Moye v. Albritton*, 7 Ired. Eq. 62; *Place v. Oldham*, 10 B. Mon. 400. An administrator of an estate that is insolvent is answerable for the whole estate in his hands to be applied in a general distribution among the creditors. If he pays one in preference to others, it is a payment in his own wrong, and such payment cannot discharge him from a liability to account for the money which he has thus expended in violation of his official duty. The only exceptions to the rule are the cases of privileged debts; and of payments made after a year from the date of the administration, without notice of other debts, to an amount which would render the estate insolvent. Hoar J. in *Cobb v. Muzzey*, 13 Gray, 58, 59. See *Hinton v. Kennedy*, 3 S. Car. 459. The administrator is guilty of a *devastavit*, if he delivers the property of the estate to the next of kin of the intestate, leaving the debts unpaid. *M'Nair v. Ragland*, 1 Dev. Ch. 516. So where an executor pays over to the residuary legatee the yearly

balances remaining after the payment of annuities given by the will, without making provision for future payments of the annuities, he will be held personally liable to the annuitants. *Stephenson v. Axson*, 1 Bailey Eq. 274.] But if the executor pays an inferior debt with his own money, though it be to the value of the testator's goods in his hands, it should seem that it will not be a *devastavit*; for the property of the assets will not be changed thereby, but they remain as against a creditor of a debt of a superior degree in the same plight as they were before. Com. Dig. Admon. I. 2; *Wheatley v. Lane*, 1 Saund. 218, by Pemberton, *arguendo*.

(*q*) *Ante*, 1340. [So by failing to invest in disobedience of the plain directions of the will. *Gilman v. Gilman*, 2 Lansing, 1.]

(*r*) See *ante*, 1028.

(*s*) See *ante*, 1348 *et seq.*

(*t*) *Ante*, 1351, 1352 *et seq.* [See *Johnson v. Fuquay*, 1 Dana, 514.] But see stat. 22 & 23 Vict. c. 35, s. 29, *ante*, 1355.

residue of a term of years, where the land is of greater yearly value than the rent, it is a *devastavit*. (u) On the other hand, if the rent be greater than the yearly value of the land, and the testator was the assignee of the term, the executor may be guilty of a *devastavit* in neglecting to exonerate the estate of the testator from its liabilities in respect of the lease by assigning it to some other person. (x) If a term be assigned by an executor in trust to attend the inheritance, he is liable to the creditors for a *devastavit*; *for the term has by this means become not assets at law. (y)

If the executor releases a debt due to the testator, or cancels or delivers to the obligor a bond, of which the testator was the obligee, this shall charge him to the amount of the debt, whether in point of fact he received it or not. (z)

(u) Wentw. Off. Ex. c. 13, p. 312, 14th ed.; Thompson v. Thompson, 9 Price, 476.

(x) Rowley v. Adams, 4 My. & Cr. 534; ante, 1750, note (l). [By statute, in New Hampshire, it is made the duty of an executor or administrator, "if there are sufficient assets, to redeem all property of the deceased under mortgage, pledge, or levy of execution, for less than its value, or which, if unredeemed, would diminish the value of the estate, unless he shall by license sell the same subject to such incumbrance; and the neglect so to redeem shall be deemed mal-administration and waste." Rev. Sts. c. 159, § 11; Tuttle v. Robinson, 33 N. H. 104, 115; Rossiter v. Cossit, 15 N. H. 38. But the administrator of an insolvent estate has no right to redeem for the benefit of the widow. If he does redeem with the assets of the estate, she is let in to dower without contribution. Rossiter v. Cossit, 15 N. H. 38. An administrator has no authority to expend the assets in clearing the estate from the widow's dower by purchase or otherwise. Stock v. Parker, 2 McCord Ch. 376; Ashurst v. Ashurst, 13 Ala. 781. In Ripley v. Sampson, 10 Pick. 373, 374, Shaw C. J. said, "It not unfrequently happens that the most important and valuable part of an estate of a deceased person consists in stocks and shares in in-

corporated companies; and in this respect there is no distinction between manufacturing and other corporations. Such shares may be of great value, and yet liable to a small assessment. The share is in the same condition with any other pledged property. If it is of more value than the amount of the assessment, it is the duty of the administrator to pay the assessment and redeem the share for the benefit of the estate. The duty of the administrator in such case is indicated by the interest of the estate with which he is intrusted. And even if the share should fall in value in his hands, after such redemption, if he shall appear to have acted in good faith and with a just regard to the best interests of the estate, he would undoubtedly be protected. But where the shares are confessedly of no value, and will be of no value after the assessment may have been paid, an administrator is not at liberty to take money out of the general assets of the estate to pay such assessment." See, also, Cutler v. Middlesex Manuf. Co. 14 Pick. 483, 484, Shaw C. J.; Bowers v. Williams, 34 Miss. 324; Rossiter v. Cossit, *supra*.]

(y) Charlton v. Low, 3 P. Wms. 330. [As to the duty and liability of executors in respect to terms for years, see Fisher v. Fisher, 1 Bradf. Sur. 335.]

(z) Wentw. Off. Ex. 303, 14th ed.;

So if he releases a cause of action founded on a tort accruing either in the lifetime of the testator, or in his own time in right of the testator, this will be a *devastavit*. (a) So if he agrees with an executor *de son tort* and accepts his covenant for payment, he will be liable for so much, though nothing be paid. (b) So if the executor takes an obligation in his own name, for a debt due by simple contract to the testator, this shall charge him as much as if he had received the money; for the new security had extinguished the old right and is a *quasi* payment to him. (c) So, if the husband of a *feme covert* executrix indulge the debtor with further time, in consideration of an express promise to pay the husband, who afterwards recovers on such promise, this is a *devastavit*. For the money recovered will not be assets of the testator's estate, and if the husband dies before execution sued, the executor or administrator of the husband, and not the wife, shall have execution. (d) So, if an executor, in his representative * character, commences an action in which he has a right to recover, and afterwards covenants with the defendant to receive a specific sum at a future day as a compensation, he will be answerable for the money as assets immediately. (e)

Cocke v. Jennor, Hob. 66; Veghelman v. Keighley, And. 138; S. C. *nomine* Brightman v. Keighley, Cro. Eliz. 43; S. C. 4 Leon. 102; S. C. Godb. 29; [De Diemar v. Van Wagenen, 7 John. 404. See Davenport v. First Cong. Society, 33 Wis. 387.] But a receipt for so much due on the bond as the executor receives, is not a *devastavit* for the residue. Wentw. Off. Ex. 303, 14th ed.; Com. Dig. Admon. I. 2. Nor a parol agreement that he will not sue for more. Ib. Nor a delivery of the bond into another hand, that it may not be sued. Ib. But see *post*, 1806, note (k); [De Diemar v. Van Wagenen, 7 John. 404. Probate courts in Massachusetts may authorize executors and administrators to release and discharge, upon such terms and conditions as appear proper, any vested, contingent, or possible right or interest belonging to the persons or estates represented by them, in or to any real or personal estate, whenever it appears to be for the benefit of the persons or estates in trust. Genl. Sta. c. 101, § 11.]

(a) Wentw. Off. Ex. 304, 4th ed.; Com. Dig. Admon. I. 1; Bac. Abr. Exors. L. 1.

(b) Com. Dig. Admon. I. 1. [If an executor takes land in payment of a debt due to his testator, he is chargeable with the price allowed by him for the lands, unless those entitled to the estate elect to take the land. Weir v. Tate, 4 Ired. Eq. 264.]

(c) Goring v. Goring, Yelv. 10; Bac. Abr. Exors. L. 1, *ante*, 1670; [note (p).] But where the executor delivered up a bond due to his testator, and took a new bond, with surety to himself for the debt, it was held that this, though a conversion in law, was none in equity. Armitage v. Metcalfe, 1 Chanc. Cas. 74.

(d) Yard v. Ellard, 1 Salk. 117; S. C. Carth. 463; 1 Ld. Raym. 368.

(e) Norden v. Levit, 2 Lev. 189; S. C. T. Jones, 88; 1 Freem. 442; S. C. cited and said to have been affirmed on error, in Dom. Proc. Barker v. Talcot, 1 Vern. 474; Jenkins v. Plombe, 6 Mod. 94. [See

[1800]

Again, if the executor submits a debt due to the testator to arbitration, and the arbitrators award him less than his due ; this, being his own voluntary act, shall bind him, and he shall answer for the full value as assets. (*f*)

But though, generally speaking, an executor, compounding, (*g*) or releasing, a debt, must answer for the same, (*g*¹) yet if it appears to have been for the benefit of the trust estate it is an excuse. (*g*²) Therefore, in a case where there were arrears of rent on a lease, and, on the tenant's becoming insolvent, the executor released the arrears, and gave him a sum of money to quit possession, Lord Talbot held that as the executor appeared to have acted

Stark v. Hunton, 3 N. J. Eq. 800.] It seems to have been once holden, that if an executor to an obligee in a penal bond, after the bond is forfeited, release the penalty on receipt of the principal and interest, this is a *devastavit*. *Wentw. Off. Ex.* 303, 14th ed. But the contrary was held by three judges, in *Kniveton v. Latham*, Cro. Car. 490. And since the statute 4 Ann. c. 16, s. 13, it is obviously no *devastavit*.

(*f*) *Wentw. Off. Ex.* 304, 14th ed.; *Anon.* 3 Leon. 53; *Com. Dig. Admon. I.* 1; *Bac. Abr. Exors. L.* 1; *Yard v. Allard*, 1 *Ld. Raym.* 369, by Holt C. J. But see stat. 23 & 24 Vict. c. 145, s. 30, *post*, 1801, and note (*i*¹).

(*g*) See *Wiles v. Gresham*, 5 De G., M. & G. 770; [*Potter v. Cummings*, 18 Maine, 55; *Patten's case*, 1 Tuck. N. Y. Sur. 56.] But see, also, stat. 23 & 24 Vict. c. 145, s. 30, *post*, 1801.

(*g*¹) [*De Diemar v. Van Wagenen*, 7 John. 404.]

(*g*²) [*Post*, note (*i*¹); *Fridge v. Buhler*, 6 La. Ann. 272; *Wyman's Appeal*, 13 N. H. 18; *Kee v. Kee*, 2 Grattan, 116; *Berry v. Parkes*, 3 Sm. & M. 625; *Woolfork v. Sullivan*, 23 Ala. 548; *Pusey v. Clemson*, 9 Serg. & R. 204; *Boyd v. Oglesby*, 23 Grattan, 674. By statute in New Hampshire an executor or administrator may be authorized by the judge of probate to compound and discharge any debts or demands due to the estate, in case of the insolvency of the debtor, on receiving a less sum than the amount due the estate. But

in *Wyman's Appeal*, 13 N. H. 18, 20, Parker C. J. said: "It is not to be doubted that, before the passage of the statute, an administrator might lawfully compound with a debtor, and receive less than the amount of the debt, if he could show that what he had done was beneficial to the estate. But he acted at some peril in the matter, for if an objection was taken, the burden of proof lay upon him to show that he had acted judiciously, and that the estate had not been prejudiced by the compromise; and if he failed in this he might be made chargeable with the difference." It would not be sufficient to show that the administrator acted in good faith, and by the advice of disinterested and judicious men. "The statute has provided a mode in which the administrator, by obtaining a previous authority from the judge, may compromise with the debtor with perfect safety, and without being subject to expense in sustaining his acts. But the right to compromise, which existed prior to the passage of the statute, is not taken away. It may still be exercised as before, subject to the same limitations and risk." A similar construction has been given to the statute of New York, allowing executors and administrators to compromise, with the surrogate's approval. *Chouteau v. Snyder*, 21 N. Y. 179; *Re Scott*, 1 Redf. Sur. 234. See *Howell v. Blodgett*, 1 Redf. Sur. 323. So in Maine, *Chase v. Bradley*, 26 Maine, 531. So in Massachusetts, *Chadbourn v. Chadbourne*, 9 Allen, 173, 174.]

for the benefit of the estate, he should be allowed both sums. (*h*) So, in *Pennington v. Healey*, (*i*) an administrator sued a debtor to his intestate, * and recovered a verdict against him; and the debtor, being in gaol, subsequently petitioned to be discharged under the insolvent act. The debtor offered terms, whereby he was to be liberated on the payment of 150*l.*, a sum less than the costs incurred in the action. The administrator agreed to the terms, and liberated the debtor. And the court of exchequer held, in an action brought against him by a creditor of the intestate, that he was not chargeable with any part of the debt as assets.

And now, by stat. 23 & 24 Vict. c. 145, s. 30, "it shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give, and execute such agreements, instruments of composition, releases, and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby." (*i*¹)

Stat. 23 &
24 Vict. c.
145, s. 30.
Executors
may com-
pound, and
refer to ar-
bitration,
&c.

(*h*) *Blue v. Marshall*, 3 P. Wms. 381. In *Leph v. Holloway*, 8 Ves. 213, an executor having, under a misconception of a will, at a trial of an issue, entered into a compromise with the creditor, expressly subject to the approbation of the court, was permitted to try the issue, paying the costs of the former proceedings.

(*i*) 1 Cr. & My. 402; S. C. 3 Tyrwh. 319.

(*i*¹) [Probate courts in Massachusetts may authorize executors and administrators to adjust, by arbitration or compromise, any demands in favor of or against the estates represented by them. Genl. Sta. c. 101, § 10. But the legislature, in conferring this power upon probate courts, "intended only to give security and protection to executors and administrators in the exercise of that authority

with which they are clothed by the common law, and to relieve them from the liability which exists at common law, to have their acts in agreeing to a submission called in question, or to have the finding of arbitrators revised or set aside to their injury, by those who were interested in the effects of the testator or intestate." The statute was not intended to repeal the rule of the common law in Massachusetts, which is that executors and administrators have full authority to submit any disputed matter relating to the estate of a deceased person in their hands to arbitration. *Chadbourn v. Chadbourn*, 9 Allen, 173, 174; *Coffin v. Cottle*, 4 Pick. 454; *Bean v. Farnam*, 6 Pick. 269; *Bacon v. Crandon*, 15 Pick. 79. So in Maine, executors and administrators have authority to submit to referees any controverted per-

But by sect. 34, "the provisions contained in this act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the passing of this act (28th August, 1860), or under a will or codicil confirmed or revived by a codicil executed after that date."

Sect 34.
To what
cases the
act ex-
tends.

sonal claims affecting the estates under their care. This authority is deduced from their right or duty to prosecute or defend suits involving the interests of the estates intrusted to their care. One mode of determining controversies, which the law has provided, is a submission to arbitration. Administrators may also pay and discharge claims against the deceased, and having power to decide upon their existence and validity, they can transfer it to another, when disputes arise concerning such claims. Hence it has been held that they can submit doubtful claims to arbitration. *Eaton v. Cole*, 1 Fairf. 137; *Weston v. Stewart*, 2 Fairf. 326; *Wells J. in Kendall v. Bates*, 35 Maine, 357, 358. Executors and administrators may, in other states, in some form, either under the common law or by statute, submit doubtful claims against the estate of the deceased to arbitration. *Childs v. Updyke*, 9 Ohio St. 333; *Woodin v. Bayley*, 13 Wend. 453; *Tracy v. Suydam*, 30 Barb. 110; *Green v. Creighton*, 7 Sm. & M. 197; *White v. Story*, 43 Barb. 124; *Russell v. Lane*, 1 Barb. 519; *Brocket v. Bush*, 18 Abb. Pr. 337; *McDaniels v. McDaniels*, 40 Vt. 340; *Barker v. Belknap*, 39 Vt. 168; *Adarene v. Marlow*, 33 Vt. 558; *Wills v. Rand*, 41 Ala. 198; *Clark v. Bomford*, 20 Ark. 440; *Anderson v. Baker*, 15 Ohio St. 173; *Sands v. Craft*, 10 Abb. Pr. 216; *Bucklin v. Chapin*, 53 Barb. 488; *Godding v. Porter*, 17 Abb. Pr. 374; *Reed v. Wiley*, 5 Sm. & M. 394; *Regan v. Stone*, 7 Sm. & M. 104; *Swicard v. Wilson*, 2 Rep. Con. Ct. 218; *Alling v. Munson*, 2 Conn. 691; *Jones v. Deyer*, 16 Ala. 221; *Overly v. Overly*, 1 Metc. (Ky.) 117; *Merchants' Bank v. Rawls*, 21 Geo. 384. In Virginia, an executor or administrator may submit a matter concerning the ad-

ministration of the estate of the deceased to arbitration; but is liable, as for a *devastavit*, if the estate is injured in consequence. *Nelson v. Cornwell*, 11 Grattan, 724. In New York the reference provided by the statute is not applicable to claims made by the executor or administrator against other parties, and in favor of the estate, except those made strictly in the way of set-off. *Akely v. Akely*, 17 How. Pr. 21. In Texas arbitration is held not to be a proper mode of establishing a rejected claim against an estate. *Yarborough v. Leggett*, 14 Texas, 677. So in Illinois an executor has no power to submit a claim against his testator's estate to arbitration. *Reitzell v. Miller*, 25 Ill. 67. But in other states the power extends as well to claims against, as to debts due to, the estate of the deceased. See *supra*; *Peters's Appeal*, 38 Penn. St. 239; *Dickinson v. Dutcher*, *Brayt. (Vt.)* 104. A disputed claim of an executor or administrator against the deceased may, in Massachusetts, be submitted to referees under an order of the probate court. *Genl. Sts. c. 97, §§ 26, 27*. See *Willey v. Thompson*, 9 Met. 329; *Dana v. Prescott*, 1 Mass. 200. So the claim of a creditor against the insolvent estate of the deceased, disallowed by the commissioners of insolvency, may, after appeal, be submitted to arbitrators, under a rule of the probate court. *Genl. Sts. c. 99, § 11*. See *Gilmore v. Hubbard*, 12 Cush. 220. It is further provided by statute, in Massachusetts, that the supreme judicial court may authorize executors or administrators to adjust, by arbitration or compromise, any controversy that may arise between different claimants to the estate in their hands, to which such executors or administrators, together with all other parties in being, claiming an interest

An executor will be guilty of a *devastavit*, if he applies the assets in payment of a claim which he is not bound to satisfy; (*j*) as if he makes disbursements in the schooling, *feeding, or clothing of the children of the deceased, subsequently to his decease. (*k*) So where the testator had been attended for many years by a physician without any fees, and the executors had paid him 100%, and he had stated in an affidavit, that the testator had promised to pay him for his services or leave him an equivalent; it was held, that as the physician could not have claimed himself as for a legal debt, the executors, who had taken on themselves to pay him, stood in the same situation as he did; and the payment, therefore, could not be allowed. (*l*) So if an executor pays a bond founded on a usurious contract, or a bond *ex turpi causa*, such payment will amount to a *devastavit*, as well against legatees as creditors. (*m*) So if the testator was bound in

in such estate, shall be parties. Stat. Mass. 1861, c. 174, § 1. And by a later act, the supreme judicial court, sitting in equity, is empowered to authorize the persons named as executors in any instrument purporting to be the last will of any person deceased, to adjust, by arbitration or compromise, any controversy that may arise thereon between the persons claiming as devisees or legatees under such will and the heirs and next of kin of the deceased; to which arbitration or compromise, the persons named as executors, those claiming as devisees or legatees, and those claiming the estate as intestate, shall be parties. Stat. Mass. 1864, c. 173, § 1. In Iowa, the executor, with the approbation of the court, may compound with any debtor of the estate who may be thought unable to pay the whole debt, or in order to avoid doubtful litigation. Laws of Iowa, Revis. 1860, p. 411, § 2368.]

(*j*) Com. Dig. Admon. I. 1; Manning v. Purcell, 7 De G., M. & G. 55; Vez v. Emery, 5 Ves. 141. In this last case Lord Alvanley said that if the executor had taken advice as to the propriety of making the payment, and had been advised by any gentleman of the law in this country that he was bound to do so, he (the learned judge) would not have held

him liable. However, the general rule is that if, under the best advice he can procure, an executor acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer. If he has been misadvised the court must act, not upon the improper advice under which he may have acted, but upon the acts he has done. Doyle v. Blake, 2 Sch. & Lef. 243. [See Wyman's Appeal, 13 N. H. 18; King v. Morrison, 1 Penn. 188.]

(*k*) Giles v. Dyson, 1 Stark. N. P. C. 32. [An executor or administrator is responsible for personal property applied by him to repairs and improvements of the real estate of the deceased, although so applied in executing an agreement of the intestate; Cobb v. Muzzey, 13 Gray, 57; and he will not be allowed for money expended by him for ardent spirits used at an auction of the goods of the deceased. Griswold v. Chandler, 5 N. H. 492.]

(*l*) Shallcross v. Wright, 12 Beav. 558. But in the same case a payment was allowed which the executors had made in respect of the loss of the furniture of the house of a friend where the testator had died of malignant fever, and which had been destroyed, under medical advice, to prevent infection.

(*m*) Winchcombe v. Bishop of Win-

a *joint* obligation, and he dies before the co-obligor, the executor is not liable on the instrument, and therefore if he pays the sum due upon it, he will be guilty of a *devastavit*. (n) However, in equity, the executor is in some instances chargeable *pari passu* with the survivor; and in such cases he is justified in applying the assets accordingly. (o) But an executor may pay a debt proved to be justly due by his testator, although barred by the statute of limitations. (p) Again, it has been held that he is not bound to plead the statute to an action commenced * against him by a creditor of the testator. (q) Thus, if the surplus of the per-

chester, Hobart, 167; S. C. cited 1 Brownl. 33; Robinson v. Gee, 1 Ves. sen. 254; Com. Dig. Admon. I. 1.

(n) *Ante*, 1013, 1741. [So an executor will be held responsible for the damage, if, by fraud or negligence, he has subjected his testator's estate to the payment of a debt for which the testator was surety, when, by reasonable diligence, it might have been collected of the principal debtor. Chambers's Appeal, 11 Penn. St. 436; Tuggle v. Gilbert, 1 Duvall (Ky.), 340. Whether an executor or administrator of a deceased surety, who might have indemnified the estate by voluntarily paying the debt and proceeding against the principal, but did not, is chargeable with the debt upon the insolvency of the principal debtor, see Utley v. Rawlins, 2 Dev. & Bat. Eq. 438.]

(o) *Ante*, 1745.

(p) Norton v. Frecker, 1 Atk. 526, by Lord Hardwicke, Stahlschmidt v. Lett, 1 Sm. & G. 415; [Parker C. J. in Hodgdon v. White, 11 N. H. 208, 214, 215; Scott v. Hancock, 13 Mass. 164; Byrd v. Wells, 40 Miss. 711. Where an executor allowed dividends due the estate, and never actually received by him, to be retained in satisfaction of a debt due from the testator, even where such debt was barred by the statute of limitations, he was held not to be chargeable with them. Broome v. Van Hook, 1 Redf. Sur. 444. It has, however, been held that an executor or administrator cannot legally pay a claim against the estate of the deceased, which was barred by the statute of limitations anterior to

the granting of administration. Trotter v. Trotter, 40 Miss. 704; Byrd v. Wells, 40 Miss. 711. So it has been held that an administrator cannot revive a demand against the estate, which was barred by the statute before the death of the intestate. Moore v. Parcher, 1 Bailey Ch. 195; Dickson v. Compton, 24 La. Ann. 83.]

(q) Williamson v. Naylor, 3 Y. & Coll. 211, note (a), by Lord Lyndhurst. But see, *contra*, by Bailey J. in McCulloch v. Dawes, 9 Dowl. & Ryl. 43. This dictum of the latter judge was disapproved by Wood V. C. (in Hill v. Walker, 4 Kay & J. 166). Lewis v. Rumney, L. R. 4 Eq. Cas. 451. [Although it is true that the executor or administrator is not bound to plead the general statute of limitations in bar of an action to recover a debt otherwise justly due; Jackson J. in Scott v. Hancock, 13 Mass. 162, 164; Hodgdon v. White, 11 N. H. 208; Amoskeag Manufacturing Company v. Barnes, 48 N. H. 25, 29; Ritter's Appeal, 23 Penn. St. 95; Emerson v. Thompson, 16 Mass. 431; Smith's Estate, 1 Ashm. 352; Steel v. Steel, 12 Penn. St. 67; Kennedy's Appeal, 4 Penn. St. 149; Miller v. Dorsey, 9 Md. 317; 2 Kent, 416, note (c); Thayer v. Hollis, 3 Met. 369; Payne v. Pusey, 8 Bush (Ky.), 564; Chambers v. Fennemore, 4 Harr. (Md.) 368; Semmes v. Magruder, 10 Md. 242; Barnawell v. Smith, 5 Jones Eq. 168; Leigh v. Smith, 3 Ired. Eq. 442; Batson v. Murrell, 10 Humph. 301; Tunsall v. Pollard, 11 Leigh, 1; Pollard v. Scaers, 28 Ala. 484; Walter v. Radcliffe,

sonal estate, after payment of the debts and legacies, be bequeathed to a residuary legatee, and several creditors, although

2 Desaus. 577; Biddle v. Moore, 3 Penn. St. 178; Fritz v. Thomas, 1 Whart. 66; M'Farland's Estate, 4 Penn. St. 149; but see Wiggins v. Lovering, 9 Missou. 262; West v. Smith, 8 How. (U. S.) 402, 411; Woods v. Elliott, 49 Miss. 168; yet he is bound in all cases to plead that statute which limits the time within which an action can be brought against him in his official capacity. The heirs-at-law and others interested have a right to insist that he shall plead it, for he stands in a place of trust, and in executing it he is to act with fidelity for their protection. Scott v. Hancock, 13 Mass. 162; Hodgdon v. White, 11 N. H. 208; Walker v. Cheever, 39 N. H. 428; Amoskeag Manufacturing Co. v. Barnes, 48 N. H. 25; Hall v. Woodman, 49 N. H. 295; Lamson v. Schutt, 4 Allen, 359, 360; Emerson v. Thompson, 16 Mass. 432; Waltham Bank v. Wright, 8 Allen, 122; Heath v. Wells, 5 Pick. 140; Wiggins v. Lovering, 9 Missou. 262; Sugar River Bank v. Fairbank, 49 N. H. 140. If he fails so to plead, and a judgment issues against him, it will not bind the estate of the deceased; and a levy of an execution obtained under such judgment on the real estate of the deceased would be void, as to all persons except the executor or administrator who suffered it to issue. Thayer v. Hollis, 3 Met. 369; Sargent J. in Amoskeag Manufacturing Co. v. Barnes, 48 N. H. 25, 29, 30. A sum paid by him to satisfy such judgment would not be allowed in his account. Hodgson v. White, 11 N. H. 216; Stillman v. Young, 16 Ill. 318. A promise by an executor or administrator to pay a debt of the deceased will not take the demand out of this latter statute. Brown v. Anderson, 13 Mass. 201; Thompson v. Brown, 16 Mass. 172, 178; Gray J. in Bacon v. Pomeroy, 104 Mass. 585; Wells v. Child, 12 Allen, 336; Waltham Bank v. Wright, *supra*. Such promise, is, however, generally held to be sufficient to avoid the effect of the general

statute of limitations. Brown v. Anderson, 13 Mass. 201, 203; Emerson v. Thompson, 16 Mass. 429; Baxter v. Peniman, 8 Mass. 134; Hodgdon v. White, 11 N. H. 210, 211, and cases cited; Jones v. Moore, 5 Binney, 573; Johnson v. Beardalee, 15 John. 3. The rule operates as well in an action against an administrator *de bonis non* as against the original executor or administrator who made the promise. Emerson v. Thompson, 16 Mass. 429. In Foster v. Starkey, 12 Cush. 324, it was expressly held that part payment of a debt, made by the administrator of the debtor, takes the case out of the general statute of limitations, although it appears that no promise was then made to pay the balance. There are, however, many cases in which it has been held that there must be an express promise by the executor or administrator to take a debt of the testator, or intestate, barred by the statute of limitations, out of its operation. See Cayuga Bank v. Bennett, 5 Hill, 240; Oakes v. Mitchell, 15 Maine, 360; Head v. Manners, 5 J. J. Marsh. 262; Peck v. Botsford, 7 Conn. 177; Thompson v. Peter, 12 Wheat. 565. The courts in Pennsylvania seem to go even farther than this, and hold that the personal representative of a party deceased is not precluded, even by an express promise of payment, from resorting to the statute as a defence to an action brought to recover a debt due by the estate. Fritz v. Thomas, 1 Whart. 66; Reynolds v. Hamilton, 7 Watts, 420; Steel v. Steel, 12 Penn. St. 64. See, also, Knox v. M'Call, 1 Brev. 531; Moore v. Parcher, 1 Bailey Eq. 195. An executor or administrator cannot maintain a petition for license to sell real estate for the payment of the debts of the deceased, if there are no debts due from the estate which can be enforced at law; as if all the debts are barred by the statute limiting the time within which an action can be brought against the executor or administrator in his official capac-

barred by the statute of limitations, commence actions against the executor, equity will not, on his refusal to plead the statute, com-

ity; *Lamson v. Schutt*, 4 Allen, 359; *Nowell v. Nowell*, 8 Greenl. 220; *Ex parte Allen*, petitioner, 15 Mass. 57; *Tarbell v. Parker*, 106 Mass. 347; *Hall v. Woodman*, 49 N. H. 304; *Scott v. Hancock*, 13 Mass. 169; *Robinson v. Hodge*, 117 Mass. 222, 225; *Ferguson v. Scott*, 49 Miss. 500; and it has been held that such license, if granted, would be void. *Heath v. Wells*, 5 Pick. 140; *Hudson v. Hulbert*, 15 Pick. 425; *Merrick J. in Lamson v. Schutt*, 4 Allen, 359, 361; *Thompson v. Brown*, 16 Mass. 172; *Thayer v. Hollis*, 3 Met. 371; *Tarbell v. Parker*, 106 Mass. 347. But *quære*, whether an order of the probate court is not valid unless vacated on appeal or in some other proceeding acting directly on the subject-matter. See *Hall v. Woodman*, 49 N. H. 295; *Mooers v. White*, 6 John. Ch. 387; *Jackson v. Robinson*, 4 Wend. 436. It was held in *Dawes v. Shed*, 15 Mass. 6, that sureties upon the bond of an administrator could not be held liable to a creditor of the estate for the amount of a judgment obtained by him in a suit commenced after the claim was barred by the statute limiting actions against executors and administrators, to which the administrator neglected to plead the statute. The same was held where the administrator appeared and pleaded the statute, and was afterwards defaulted. *Robinson v. Hodge*, 117 Mass. 222. See *Heard v. Lodge*, 20 Pick. 53, 58. In *Robinson v. Hodge*, *supra*, Wells J. said: "Whether sureties of an administrator could go behind a judgment rendered against his defence upon the plea of the statute set up and attempted to be maintained in good faith, we need not now consider. The report shows that the defence might and ought to have been maintained successfully, and that the administratrix did not attempt it, but allowed judgment to go by default. Such a judgment may be binding upon the administratrix personally, and perhaps upon the personal assets remaining in her

hands, if they can be reached by means of the execution. But it will not support supplementary proceedings for the appropriation of the real estate of the intestate, either by levy of the execution or by sale under license of the probate court; because it is not founded upon a valid subsisting debt for which the real estate is chargeable." *Thayer v. Hollis*, 3 Met. 369; *Lamson v. Schutt*, *supra*. "Non-payment of a judgment so obtained is not maladministration which constitutes a breach of the bond." But if the creditor in such judgment "could reach the goods and effects of the intestate in the hands of the administratrix, he might thus make the sureties liable to the distributees for the waste caused by the neglect of the administratrix, because that would be a breach of the bond." Wells J. in *Robinson v. Hodge*, 117 Mass. 225. In *Amoskeag Manuf. Co. v. Barnes*, 48 N. H. 25, 30, referring to the statute limiting the time for bringing actions against executors and administrators, Sargent J. said: "It is everywhere said that the executor must plead the statute, and has no right to omit to plead it, and that when he fails to do so, a judgment issues against him, which would be good against him as an executor *de son tort*, but which would not bind the estate; and no license would be granted to the executor to sell real estate of his testator to pay such judgment." *Thayer v. Hollis*, 3 Met. 371; *Ex parte Allen*, 15 Mass. 58. An executor or administrator may, however, obtain license for the sale of real estate of the deceased for the purpose of paying claims barred by the general statute of limitations, if they are admitted by him and appear to be just. *Hodgdon v. White*, 11 N. H. 208. But if, on the application for license to sell, evidence is offered to show that the demands for the payment of which the license is asked have in fact been paid, or if they are so stale that, aside from the statute of limitations, a strong presumption arises against

pel him to plead it in favor of the residuary legatee. (r) So in the administration of assets under a creditor's bill, it was held that executors were not bound to plead the statute; and if they did not, the creditor filing the bill would have a decree on behalf of himself and all other creditors, and would be paid. (s) And, accordingly, on the modern proceeding by a creditor's administration summons, if the executor does not set up the statute, the residuary legatees cannot set it up against the plaintiff, whatever may be their right as to other creditors. (t) But in *Shewen v. Vandenhorst*, (u) under the common decree in an administration suit, where the bill had been filed, and the decree obtained, by the residuary legatee, a creditor applied to prove a debt which was barred by lapse of time; and the executor refusing to interfere, the plaintiff insisted upon setting up the objection of the statute. Sir John Leach M. R. held that it was competent for the * plaintiff, or any other person interested in the fund, to take advantage of the statute before the master, notwithstanding the refusal of the executor. And this decision was confirmed by Lord Brougham on appeal. (v) And even on a creditor's administra-

their validity, that will form a sufficient ground upon which the court in its discretion, may refuse to grant a license. *Hodgdon v. White*, *supra*; *Mooers v. White*, 6 John. Ch. 369, and cases cited; *Scott v. Hancock*, 13 Mass. 162. "Such a state of facts might furnish good reason for disallowing the amount of the administration account if the administrator had paid claims of that description out of the personal estate." Parker C. J. in *Hodgdon v. White*, 11 N. H. 215. That the power vested in the court to grant license to sell real estate for the payment of debts is discretionary, and not imperative, see, further, *Nowell v. Nowell*, 8 Greenl. 220. It has been held that the heir may resist the application of an administrator to sell real estate for the payment of debts, by showing that such debts are not a charge upon the estate by reason of being barred by the statute of limitations. *Heirs of Bond v. Smith*, 2 Ala. 660.]

(r) *Castleton v. Fanshaw*, Prec. Chanc. 100; S. C. 1 Eq. Cas. Abr. 305; 2 Eq. Cas. Abr. 254, pl. 1, 259, pl. 1.

(s) *Ex parte Dewdney*, 15 Ves. 498.

(t) *Briggs v. Wilson*, 5 De G., M. & G. 12. See, also, *Fuller v. Redman*, 26 Beav. 614. So, after decree in an administration suit, the court is not bound, on behalf of an absent party beneficially interested in the estate, to disallow claims against the estate barred by the statute, if the personal representative and such of the persons beneficially interested as are parties to the suit or have come in under the decree, do not set up the statute. *Alston v. Trollope*, L. R. 2 Eq. 205.

(u) 1 Russ. & My. 347; 2 Russ. & My. 75.

(v) See, also, *Moodie v. Bannister*, 4 Drew. 432; *Fuller v. Redman*, 26 Beav. 614; [*Partridge v. Mitchell*, 3 Edw. Ch. 180.] After decree an executor cannot exercise any discretion at all or do any act to vary the rights of the parties, and he cannot therefore give an acknowledgment to take a debt out of the statute of limitations. *Phillips v. Beal*, 32 Beav. 26.

tion summons, the *cestuis que trustent* of devised estates may set up the statute against him, though the executor should decline to do so ; for they would have been necessary parties to the suit but for the chancery amendment act, and might have set up the statute by answer. (x)

Such acts of negligence, or careless administration, as defeat the rights of creditors, or legatees, or parties entitled in distribution, amount to a *devastavit*. For if persons accept the trust of executors, they must perform it ; they must use due diligence, and not suffer the estate to be injured by their neglect. (y) Thus if an executor has a lease for years, determinable upon the life of J. S., which is upon a reasonable estimate worth 200*l.*, if the executor will not sell this but keeps it, and J. S. dies in a short time, yet the executor shall answer for the value of it at the time of the death of the testator ; for it was his own fault that he would not sell it. (z) So if an executor delays the pay-

(x) *Briggs v. Wilson*, 5 De G., M. & G. 12. See, also, *Beeching v. Morpew*, 8 Hare, 129, where it was held, that in a creditor's bill against a husband and wife for a payment out of an estate of which the wife was administratrix, she alone might set up the statute in their joint answer. But where judgment has been recovered against an executor for a debt due by the testator, the statute cannot afterwards be set up in an administration suit. *Hunter v. Baxter*, 3 Giff. 214. [It has been held to be clearly the duty of an administrator to plead the statute of limitations, where the claim is barred in the lifetime of the intestate, or is so stale as to raise a presumption of payment from lapse of time ; or where the statutory prerequisites to its prosecution have not been complied with. *Rector v. Conway*, 20 Ark. 79 ; *Rogers v. Wilson*, 13 Ark. 507 ; *Patterson v. Cobb*, 4 Florida, 481.]

(y) *Tebbs v. Carpenter*, 1 Madd. 298 ; [Dean *v. Rathbone*, 15 Ala. 328 ; *Harris v. Parker*, 41 Ala. 604.] See *Eaves v. Hickson*, 30 Beav. 136, where trustees were held liable who had paid over the trust fund to wrong persons, trusting to a forged marriage certificate. See, also, *Hopgood v. Parkin*, L. R. 11 Eq. 74, where a trustee

was held liable for a loss of a trust fund, occasioned by the negligence of his solicitor. [But see *Rayner v. Pearsall*, 3 John. Ch. 578 ; *Calhoun's Estate*, 6 Watts, 185. Where an executor or administrator acts in good faith, he will not be charged with the loss of property belonging to the estate, except upon clear proof of his neglect of duty. *Williams v. Maitland*, 1 Ired. Eq. 92 ; *Perry v. Maxwell*, 2 Dev. Ch. 488 ; *Whitted v. Webb*, 2 Dev. & Bat. Ch. 442 ; *Doud v. Sanders*, 1 Harp. Ch. 277 ; *Webb v. Bellinger*, 2 Desaus. 482 ; *Huson v. Wallace*, 1 Rich. Ch. 1 ; *Cartwright v. Cartwright*, 4 Hayw. 134 ; *Calhoun's Estate*, 6 Watts, 185 ; *Voorhees v. Stoothoff*, 11 N. J. (Law) 145 ; *post*, 1806, note (g) ; *Nyce's Estate*, 5 Watts & S. 254 ; *Noble v. Jones*, 35 Texas, 692. He is entitled to credit for notes lost without his negligence ; *Stoug v. Wilkson*, 14 Misson. 116 ; and for other funds which have become worthless without his default. *Pitts v. Singleton*, 44 Ala. 363. In order to charge an executor or administrator with loss on the ground of his negligence, the neglect must be proved. *Deas v. Spann*, 1 Harp. Ch. 176.]

(z) *Phillips v. Phillips*, 2 Freem. 12 ; *Taylor v. Tabrum*, 7 Sim. 28. See *ante*,

ment of a debt * payable on demand with interest, and suffers judgment for the principal and interest incurred after the testator's death, this is a *devastavit* for the interest, unless the executor can show that the assets were insufficient to discharge the debt immediately. (a) And where the executor permits debts carrying interest at 5l. per cent, to run on, when he had in his hands a fund to pay them, he shall be charged with interest at that rate. (b) But it must be observed, that where there is a sufficiency of assets for the payment of debts, executors may pay simple contract debts, not bearing interest, before specialty debts bearing interest, if not objected to by the specialty creditors ; and the legatees are not at liberty to complain of the order of payment. (c)

Again, if the executor, by his delay in commencing an action, has enabled the debtor of his testator to protect himself under a plea of the statute of limitations, this amounts to a *devastavit*. (d) So where the testator had lent out money on bond, and the executor during several years made one application, by an attorney, to the obligor, but brought no action against him, Lord Thurlow held that the executor should be liable for the sum due, as having not been got in by reason of his neglect, although it did not appear whether the debt was or was not recoverable. (e)

1669; *Fry v. Fry*, 27 Beav. 144. But see, also, *Selby v. Bowie*, 4 Giff. 300. [A sale of bonds of an estate by an executor, at a large discount, when the circumstances of the estate do not require it, renders the executor liable for the loss. *Pinchard v. Woods*, 8 Grattan, 140.]

(a) *Seaman v. Everard*, 2 Lev. 40; Com. Dig. Admon. I. 1; Bac. Abr. Exors. L. 1. So if an executor may save the penalty of a bond by payment of the less sum specified in the condition, or by other performance of the condition, and he neglect to do so, it will be a *devastavit* in him, if he have assets. 1 Saund. 333 a, note (7) to *Hancock v. Prowd*:

(b) *Hall v. Hallet*, 1 Cox, 134, 138; *Dornford v. Dornford*, 12 Ves. 130, note (29), 2d ed. See, also, *Bate v. Robins*, 32 Beav. 73; [*Forward v. Forward*, 6 Allen, 494, 499.] See *infra*, 1743, 1744 *et seq.*, as to charging executors with interest.

(c) *Turner v. Turner*, 1 Jac. & W. 39.

(d) By Holt C. J. in *Hayward v. Kinsey*, 12 Mod. 573. But see *East v. East*, 5 Hare, 348. [But it is otherwise, where the delay is suffered in consequence of a mistake of the law, without any fraud or wilful default imputable to the executor or administrator. *Thomas v. White*, 3 Litt. (Ky.) 177.]

(e) *Lowson v. Copeland*, 2 Bro. C. C. 156. [But see *Ivey v. Coleman*, 42 Ala. 409.] In *Clack v. Holland*, 19 Beav. 271, 272, Romilly M. R. said that where it is the duty of an executor to obtain payment of a sum of money, he is exonerated, though he has taken no steps at all, provided it appears that if he had done so, they would have been, or there is reasonable ground for believing they would have been, ineffectual. But in such a case, it should seem that it lies on the executor to prove that, if he had taken proper

So where, for more *than three years, the executors permitted money to remain due on bond to their testator, without inquiring into the circumstances and situation of the obligor, or calling upon him to pay in the money, Lord Alvanley held, that, on the obligor's becoming bankrupt, the executors were responsible. (*f*) So where executors had suffered rent to be in arrear for several years, without taking any legal steps, by distress or otherwise, Sir Thomas Plumer held that they should be charged with such arrears. (*g*) And it was held by Lord Cottenham, that executors

measures to obtain payment, they would have failed. *Stiles v. Guy*, 16 Sim. 230; [*Mitchell v. Trotter*, 7 Grattan, 136; *Nelson v. Page*, 7 Grattan, 160. An executor or administrator is not bound to attempt the collection of bad or doubtful debts. *Succession of Pool*, 14 La. Ann. 677; *Griswold v. Chandler*, 5 N. H. 492; *Sanborn v. Goodhue*, 28 N. H. 48; *Hepburn v. Hepburn*, 2 Bradf. Sur. 74; *Cook v. Cook*, 29 Md. 538; *Bowen v. Montgomery*, 48 Ala. 353; *ante*, 986, note (*m*). An executor or administrator who fails to collect the debts of the estate he represents, as they become due, or collects the same in illegal or worthless funds, is guilty of a *devastavit*, and is subject to removal, unless a sufficient excuse is shown for such acts. *Oglesby v. Howard*, 43 Ala. 144. See *Moore's Estate*, 1 Tuck. N. Y. Sur. 41. And he is liable for the money which he fails to collect through his negligence. *Abercrombie v. Skinner*, 42 Ala. 633.]

(*f*) *Powell v. Evans*, 5 Ves. 832. See, also, *Atty. Gen. v. Higham*, 2 Y. & Coll. C. C. 634, and *post*, 1815. [An administrator is chargeable who neglects several years to collect a note when it might have been collected by proper diligence. *Long's Estate*, 6 Watts, 46; *Scarborough v. Watkins*, 9 B. Mon. 540; *Stark v. Hunton*, 2 Green. Ch. 300; *Schultz v. Pulver*, 11 Wend. 361; *Cartwright v. Cartwright*, 4 Hayw. 134.]

(*g*) *Tebbs v. Carpenter*, 1 Madd. 290. See *Buxton v. Buxton*, 1 My. & Cr. 95, by Sir C. Pepys M. R.; *post*, 1816; *Ratcliffe v. Winch*, 17 Beav. 217; [*Shaffer's*

Estate, 46 Penn. St. 131; *Charlton's Estate*, 34 Penn. St. 473; *Long's Estate*, 6 Watts, 46; *Southall v. Taylor*, 14 Grattan, 269; *Schultz v. Pulver*, 11 Wend. 363; *S. C. 3 Paige*, 182; *Smith v. Hurd*, 8 Sm. & M. 682; *Brandon v. Judah*, 7 Ind. 545; *Cartwright v. Cartwright*, 4 Hayw. (Tenn.) 134; *Cooley v. Vansyckle*, 14 N. J. Eq. 496; *Holcomb v. Holcomb*, 11 N. J. Eq. 281; *Jennings v. Weeks*, 1 Rice (S. Car.), 453; *Scarborough v. Watkins*, 9 B. Mon. 540; *Brazeale v. Brazeale*, 9 Ala. 491; *Moore v. Beauchamp*, 4 B. Mon. 71. It has been held that an executor or administrator is responsible for loss by the insolvency of a debtor to the estate, only when he has failed to exercise the same care that a prudent man would exercise in the conduct of his own affairs. *Glover v. Glover*, 1 McMullan Ch. 153; *O'Dell v. Young*, 1 McMullan, 155; *Taveare v. Ball*, 1 McCord, 456; *Campbell v. Miller*, 38 Geo. 304; *King v. King*, 37 Geo. 205; *Dean v. Rathbone*, 15 Ala. 328; *Rayner v. Pearsall*, 3 John. Ch. 578; *Mikell v. Mikell*, 5 Rich. Eq. 442; *Bryant v. Russell*, 23 Pick. 546; *Twaddell's Appeal*, 5 Penn. St. 15; *Sollee v. Croft*, 7 Rich. Eq. 46; *Gray v. Lynch*, 8 Gill, 403; *Neff's Appeal*, 57 Penn. St. 91. He is not chargeable for the loss of a note belonging to the estate of the deceased, by not immediately suing it, when the maker continued in good credit, and no bad faith or gross negligence was shown on the part of the executor or administrator. *Keller's Appeal*, 8 Penn. St. 288. See *Estate of Secondo Bosio*, 2 Ashm. 437; *Deas v.*

are equally chargeable with neglect in allowing a part of the assets to remain outstanding in an improper state of investment, whether the person in whose hands it is so outstanding be a co-executor or a stranger; and notwithstanding the will contains the usual indemnity clause. (*h*)

There has been occasion to discuss, in a previous part of this work, (*i*) the question of the liability of an executor or administrator, in respect of assets come fully into his possession and hands, and afterwards lost to the estate. (*k*) It * was there stated that an executor or administrator has been considered to stand in the condition of a gratuitous bailee, with respect to whom the law is, that he shall not be charged without some default in him. But this, as it appears from the judgment of Lord Ellenborough, in *Crosse v. Smith*, (*l*) must not be understood of the extent of the liability of an executor or administrator at law, but

Devastavit
by loss of
the assets:

[See stat.
22 & 23
Vict. c. 85,
s. 81, *post*,
1828.]

at law:

Spann, 1 Harper (S. Car.), 176; *Ruggles v. Sherman*, 44 John. 446; *Hartsfield v. Allen*, 7 Jones (Law), 439; *Rubottom v. Morrow*, 24 Ind. 202; *Cook v. Cook*, 29 Md. 538; *Neff's Appeal*, 57 Penn. St. 91; *Kee v. Kee*, 2 Grattan, 116; *Mikell v. Mikell*, 5 Rich. (S. Car.) Eq. 220. Nor is the executor liable for indulging a debtor to the estate, where the indulgence is granted with the acquiescence of the distributees. *Perry v. Wooten*, 5 Humph. 524. But an administrator, who neglected to recover property belonging to the intestate's estate, from persons who had it in their possession, in consequence of a bond of indemnity, given him by such person, against all acts or omissions to act, as such administrator, was held liable for the amount lost to the estate by his misconduct. *Holmes v. Bridgman*, 37 Vt. 28. An executor or administrator will be held chargeable with the value of personal property belonging to the estate, and lost through his negligence, although it never came into his possession. *Tuttle v. Robinson*, 33 N. H. 104, 120, 121. But he cannot be charged with a *devastavit* in regard to property of which it does not appear that he ever knew the existence. *Jones v. Ward*, 10 Yerger, 160.]

(*h*) *Styles v. Guy*, 1 Mac. & G. 422; *post*, 1828. See, also, *Mucklow v. Fuller Jacob*. 198; *Stiles v. Guy*, 4 Y. & Coll. 571; *Dix v. Burford*, 19 Beav. 409. But see, also, *Paddon v. Richardson*, 7 De G., M. & G. 563. [If an executor or administrator receives, as assets of the estate, a note secured by mortgage on property more than sufficient to pay it, and makes no effort to enforce the security, he is chargeable with the amount of the note, upon the insolvency of the maker, unless he furnishes satisfactory reasons for his failure to do so. *Willis v. Willis*, 16 Ala. 652.]

(*i*) *Ante*, 1668, 1669.

(*k*) In a case where the executor had lost a bond due to the testator, the court inclined to charge the executor with the debt; but for the present directed only that the defendant should prosecute a suit brought by him in equity against the obligor with effect, in order to recover the money due upon the bond that was lost. *Goodfellow v. Burchett*, 2 Vern. 299. It is now established, that a lost bond may be put in suit at law. *Read v. Brookman*, 3 T. R. 151; 1 Saund. 9, note (*a*).

(*l*) 7 East, 258.

merely in equity. His lordship there observed, that it had been suggested in argument, that an executor was to be considered as a mere ordinary bailee ; but that this was an idea probably then for the first time suggested in a court of law. (*m*) “As no case at law,” continued the learned judge, “has yet decided that an executor once become fully responsible, by actual receipt of a part of his testator’s property, for the due administration thereof, can found his discharge in respect thereof, as against a creditor (*m*¹) seeking satisfaction out of the testator’s assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees, in cases of loss without any negligence on their part, (*n*) I say as no such case in respect to executors has yet occurred in a court of law, we are not, from the particular hardship of the present case, authorized to make such a precedent in favor of this defendant.”

However, a more lenient doctrine has, at all events, been established in the courts of equity, (*o*) as will fully appear in equity: the course of this section.

Thus, if any goods of the testator are stolen from the possession of an executor, or from the possession of a third person loss by theft or casualty: to whose custody they have been delivered by the * executor, or are lost by casualty, as by accidental fire, (*p*) the executor shall not, in equity, be charged with these as assets. (*q*)

Again, where an executor puts out the money of his testator, though without the indemnity of a decree, upon a real loss by invalid security: security, which there was no reason then to suspect, but

(*m*) See, however, Wentw. Off. Ex. 235, 14th ed.

(*m*¹) [See Verner’s Estate, 6 Watts, 250; post, 1836. The liabilities of executors with respect to creditors have been held to be more stringent than in respect to legatees. M’Nair’s Appeal, 4 Rawle, 148.]

(*n*) But see Wentw. *ubi supra*; Com. Dig. Assets, D.; ante, 1668, 1669.

(*o*) See the judgment of Lord Eldon in Massey v. Banner, 1 Jac. & W. 248.

(*p*) Croft v. Lyndsey, 2 Freem. 1. It seems that executors are not bound either to insure or to continue the insurance of their testator. Bailey v. Gould, coram Al-

derson B. 4 Y. & Coll. 221. [So an administrator is not required to insure the estate of his intestate. Dortch v. Dortch, 71 N. Car. 224. But see Tuttle v. Robinson, 33 N. H. 104.]

(*q*) Jones v. Lewis, 2 Ves. sen. 240; [Mikell v. Mikell, 5 Rich. Eq. 220; Rubottom v. Morrow, 24 Ind. 202; Estate of Secondo Bosio, 2 Ashm. 437; Neff’s Appeal, 57 Penn. St. 91; Campbell v. Miller, 38 Geo. 304; Furman v. Coe, 1 Caines Cas. 96; Fudge v. Durn, 51 Missou. 264; State v. Meagher, 44 Missou. 356; Stevens v. Gage, 55 N. H. 175; 2 Central Law Jour. 589.]

afterwards such security proves bad, the executor is not accountable for the loss, any more than he would have been entitled to the profits, had it continued good. (r)

But the rule is, never to permit a trustee or executor *after a decree* to account, to lay out money on mortgage, or to deal with the assets for the purposes of investment, without the leave of the court. Where, therefore, the executor, after a decree, and consequently after he might have had the directions of the court, chooses to lay out the money on mortgage, if the transaction should appear to be for the benefit of the party entitled, the court will give him the advantage of it; but if otherwise, will consider the fund as money, and make the executor bring it into court. (s)

With respect to loans upon personal security, the court of king's bench, in *Webster v. Spencer*, (t) was of opinion that an executor, who had lent out, on the security of a promissory note, money belonging to the testator, but not wanted for the immediate uses of the will, was not guilty of a *devastavit*, provided he exercised a fair and reasonable *discretion on the subject. (u) Nevertheless,

(r) *Brown v. Litton*, 1 P. Wms. 141. But see *Norbury v. Norbury*, 4 Madd. 191. On the general question as to the precautions which an executor ought to take, and the extent to which he may properly lend, with reference to the value of the property to be mortgaged, see *Stickney v. Sewell*, 1 My. & Cr. 8, 15; *Macleod v. Annealey*, 16 Beav. 600; *Phillipson v. Gatty*, 7 Hare, 516; *Farrar v. Barraclough*, 2 Sm. & G. 231, 235; *Ingle v. Partridge*, 34 Beav. 411; [*Bogart v. Van Velsor*, 4 Edw. Ch. 718. When an executor or administrator has money of the estate in his hands, and there are no reasons why he should retain it, and he has an opportunity of paying it over to the legatees or the next of kin, he should do so, and will not be heard to say that he had loaned it out for the sake of interest. But if there are reasons why he should retain it in order to meet the exigencies of his office, or to pay debts, if established, or because there was no one here authorized to receive it, he is not only permitted but encouraged to invest it in interest-bearing securities, for the benefit of the fund. *Dortch v. Dortch*, 71 N. Car. 224, 226; *Wood v. Myrick*, 17 Minn. 408.

In Massachusetts, the probate court may authorize the money belonging to an estate in the process of settlement to be deposited in any bank or institution in the state, empowered to receive such deposits, upon such interest as said bank or institution may agree to pay. St. 1873, c. 224, § 1. And so by the same statute, the probate court may direct the temporary investment of such money in securities to be approved by the judge.]

(s) *Widdowson v. Duck*, 2 Meriv. 494, 498, 499. [See *State v. Johnson*, 7 Blackf. 529. An administrator is accountable for money left in the hands of a purchaser, under an order of sale from the court, if it is lost. *Dillabaugh's Estate*, 4 Watts, 177; *S. P. Betts v. Blackwell*, 2 Stew. & P. 373; *Palmer*, appellant, 1 Doug. 422. So, if he takes the purchaser's note without security. *King v. King*, 3 John. Ch. 552; *Davis v. Yerby*, 1 Sm. & M. Ch. 508.]

(t) 3 B. & Ald. 360.

(u) In this case, one of two executors had lent the money in question on the promissory note, and the question was, whether both the executors were properly

although the lending itself may not amount to a legal *devastavit*, yet the rule is now completely established in equity, that an executor or administrator, lending money of the deceased upon bond, promissory note, or other personal security, is guilty of a breach of trust, (x) and shall be personally answerable if the security prove defective. (x¹)

If, however, the will directs the executors to lay out the fund in real or personal securities, they would be justified, as against legatees, using a sound discretion, and fairly and honestly lending it to a person whom they considered responsible, at a reasonable interest. (y) But the rule is different, it should seem, as against creditors. (z) And though the will gives the executors power to lend on personal security, this does not enable them, even as against legatees, to *accommodate* a trader with a loan on his bond. (a)

It must further be observed, that where a testator empowers loss from
loans to
each other: his executors to lend money on personal security, he must be taken to rely upon the united vigilance of them

joined as plaintiffs in an action to recover it. It was assumed, that if the loan had been a *devastavit*, the executor who was the lender ought to have sued alone in his individual character. But see the observations of Bayley J. in *Clark v. Hougham*, 2 B. & C. 155; *ante*, 879. [See *Moore v. Beauchamp*, 4 B. Mon. 71.]

(x) *Terry v. Terry*, Prec. Chanc. 273; S. C. Gilb. Eq. Rep. 10; *Ryder v. Bickerton*, 3 Swanst. 80, note; S. C. 1 Eden, 149, note; *Adye v. Feuilliteau*, 1 Cox, 24; S. C. 3 Swanst. 84, note; *Holmes v. Dring*, 1 Cox, 1; *Wilkes v. Steward*, Coop. 6; *Vigrass v. Binfield*, 3 Madd. 62; *Walker v. Symonds*, 3 Swanst. 63, overruling *Harden v. Parsons*, 1 Eden, 145; *Bacon v. Clark*, 3 My. & Cr. 294. [See the discussion of the subject of the securities in which investments should be made, in *King v. Talbot*, 40 N. Y. 76. See, also, *Thornton v. Smiley*, Breese, 14; *Moore v. Hamilton*, 4 Florida, 112.]

(x¹) [As to the liability of executors and administrators for making unauthorized loans of the funds of the estate, see *Johnson v. Maples*, 49 Ill. 101; *Wells v. Grigsby*, 42 Ala. 473; *McElroy v. Thompson*, 42 Ala. 656.]

(y) *Forbes v. Ross*, 2 Cox, 116. [A power given to executors to change investments of personal estate, as may be thought most advantageous for the estate, will authorize the executors to dispose of an unproductive and constantly depreciating stock at less than par, although the testator expressed a wish that that stock should not be sold for less than par, unless thought necessary. *Stephens v. Milnor*, 24 N. J. Eq. 358. Where executors are directed by the will to place money at interest for a stipulated time, by making a deposit of it in bank or to loan upon mortgage, they have a discretion to loan it for less periods than the whole time named, and to re-loan it from time to time, and change the securities, as they may deem best for the parties interested. *Miller v. Proctor*, 20 Ohio St. 442.]

(z) See *Doyle v. Blake*, 2 Sch. & Lef. 239, 240; [*post*, 1836.]

(a) *Langston v. Ollivant*, Coop. 33. See, further, as to *devastavit* by suffering money to remain in the hands of bankers, &c. which, according to the directions of the trust, should have been invested in a particular mode. *Bacon v. Clark*, 3 My. & Cr. 294; *Lowry v. Fulton*, 9 Sim. 115.

*all, with respect to the solvency of the borrowers. If one of them lends to the other, this object is defeated; consequently such a loan is a breach of trust, and a misappropriation of the fund; and if any mischief arises to the estate of the testator therefrom, the executors will be liable. (b) Accordingly, in *Stickney v. Sewell*, (c) two executors were empowered by will to lend money on government, real, or personal security. One of them, in 1815, lent part of the fund to the other executor and his partner in trade, upon mortgage. The mortgagors became bankrupts in 1831, and then the mortgaged property, which consisted in part of a windmill, a watermill, and a house in a town, being sold, produced considerably less than the sum advanced. And it was held by Sir C. Pepys M. R. that the executors were liable for the deficiency.

However, as it will presently appear, (d) an executor is not justified in unnecessarily keeping his testator's money ^{loss by fall} dead in his hands; and therefore, if the exigencies of ^{of stocks;} his office do not require otherwise, the executor should invest the unemployed money in government securities, taking care to lay it out in that fund which the court of chancery adopts, viz, the three per cent. consols. (e) The rule has been that if an executor lays out the testator's money in the three per cents., he is not liable for the fall of stocks. (f) * But if he invests ^{by not in-} it in any other fund, which afterwards sinks in value, ^{vesting in} the loss will be thrown on him, although there be no ^{the three} per cents.:

(b) — Walker, 5 Russ. 7; *Gleadow v. Atkin*, 2 Cr. & Jerv. 548, 555; S. C. 2 Tyrwh. 593. But if the one should give a bond to the other, to save him harmless from the consequences of such a breach of trust, the bond would be valid at law. *Warwick v. Richardson*, 10 M. & W. 284.

(c) 1 My. & Cr. 8.

(d) *Post*, 1815.

(e) *Holland v. Hughes*, 16 Ves. 114; *Tebbs v. Carpenter*, 1 Madd. 306; *Norbury v. Norbury*, 4 Madd. 191. Where a trustee has trust money in his hands, which he is authorized to lay out in the public funds or on real security, he is justified, pending the necessary delay in completing an anticipated mortgage, in investing the money in exchequer bills. *Matthews v. Brise*, 6 Beav. 239.

(f) *Peat v. Crane*, 2 Dick. 499, note; *Franklin v. Frith*, 3 Bro. C. C. 434; *Howe v. Lord Dartmouth*, 7 Ves. 150; 4 Madd. 306; 3 My. & Cr. 496. So if he invests money in the three per cents., and *duly* appropriates the same for the benefit of a legatee, the executor shall not be liable for the fall of stocks. *Ex parte Champion*, cited in *Hutcheson v. Hammond*, 3 Bro. C. C. 147; *Fonbl. Treat. Eq. bk. 2, c. 7, s. 6*, note (p). But it is otherwise where the appropriation is unduly made. Thus where a legacy was left to A. on marrying with consent, and, till marriage, interest to be paid at three per cent.; and the executrix laid out a sum equal to the legacy, and conveyed to trustees in trust to pay the legacy with three per cent. interest, and to pay the surplus interest to her; it

[1810] [1811]

mala fides on his part. (g) On the other hand, if any profit happen by the rise of the stock in which the executor has laid out the money, he shall not have the benefit, but it shall accrue to the estate of his testator. (h)

And it should seem, that if the testator died, leaving stock in other funds than the three per cents., it was the duty of the executor to transfer such stock into the latter fund. (i)

But now by stat. 22 & 23 Vict. c. 35, s. 32 (which by stat. 23 & 24 Vict. c. 38, s. 12, is to operate retrospectively), a trustee, executor, or administrator may invest the trust on real securities in any part of the United Kingdom, or on the stock of the bank of England or Ireland, or in East India stock (unless he be expressly forbidden by the instrument *creating the trust), provided the investment be reasonable and proper. (j) Again, by stat. 23 & 24 Vict. c. 38, s. 11: when a general order shall have been made under the 10th section as to investment of cash under the control of the court, it shall be lawful for trustees, executors, or administrators having power to invest their trust funds upon government securities or upon parliamentary stocks, funds, or securities, to invest such trust funds in any of the stocks, funds, or securities in or upon which by such general order cash under the control of the court may be invested. (k) And by stat. 23 & 24 Vict. c. 145, s.

was holden that this was not a good appropriation, and, the stocks having fallen in value, that the executrix's estate should make it good. *Cooper v. Douglas*, 2 Bro. C. C. 232. See *ante*, 1401. [An executor at the time of the enactment of statutes of the United States making treasury notes a legal tender for payment of debts, was not bound thereupon to convert money in his hands into coin, nor thereafter to require payment in coin of debts due to the estate; nor was he guilty of maladministration in receiving and paying treasury notes as money in the execution of his trust; nor could he be required to account in coin for the assets. *Jackson v. Chase*, 98 Mass. 286. See *Glenn v. Glenn*, 41 Ala. 571; *Shaw v. Coble*, 63 N. Car. 377; *Succession of Lagarde*, 20 La. Ann. 148.]

(g) *Hancom v. Allen*, 2 Dick. 498; *Howe v. Lord Dartmouth*, 7 Ves. 150; 3

My. & Cr. 497. See, also, *Gordon v. Bowden*, 6 Madd. 342. He will not be answerable for any further loss than was occasioned by his buying the other stock instead of the three per cents. *Hynes v. Redington*, 1 Jones & Lat. 589. It may be doubted whether, where trustees have the power of investing moneys in government securities, they are absolutely bound to select three per cents. for that purpose. See *Angell v. Dawson*, 3 Y. & Coll. 316, per Alderson B.; 1 De G., M. & G. 255, 256, by Lord Cranworth.

(h) *Phayre v. Peree*, 3 Dow. 128.

(i) 7 Ves. 161, 162; 16 Ves. 114.

(j) See *Cockburn v. Peel*, 3 De G., F. & J. 170.

(k) By general order promulgated February, 1861, cash under the control of the court may be invested in bank stock, not only in three per cent. consols, but also in

25, trustees having trust money in their hands, which it is their duty to invest at interest, may, at their discretion, invest the same in any of the parliamentary stocks or public funds, or in government securities, and may call in trust funds invested in any other securities, and invest them on any such securities, and may from time to time vary any such investments for others of the same nature, provided that no such investment (except in the three per cent. consols) shall be made where there is a person entitled in possession to receive the income for his life, or for a term of years determinable with his life, or for any greater estate, without his consent in writing. But by sect. 34, the provisions of this act shall extend only to persons entitled or acting under a deed or will or other instrument executed after the passing of the act (28th August 1860). Since the passing of these statutes executors are justified in allowing money invested in bank stock and East India stock (*l*) to remain as *interim* investments on those securities, although the will directs a positive conversion * and investment in the public stocks or funds of Great Britain, until the whole can be invested in land. (*m*)

stat. 23 &
24 Vict. c.
145, s. 25:
in what
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ments of
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may be
made:

Again, it has already appeared, (*n*) that where personal property is bequeathed for life with remainder over, and not specifically, it is the duty of the executor, with certain exceptions, to convert it into three per cents.; and the tenant for life is entitled only upon that principle. In the case of *Dimes v. Scott*, (*o*) a testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real securities, of which they were to stand possessed, upon trust for A. during her life, and after her death, for B. The trustees permitted a share, which the testator had in an Indian loan, bearing interest at 10% per cent., to remain for several years on that security, during which time they paid to A. the interest at 10% per cent., which it yielded annually; and the loan being afterwards paid off, they invested the money in the three per cents., at a time when the funds were so low that the amount of

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East India stock, exchequer bills, and two and a half per cent. annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales.

(*l*) See stat. 30 & 31 Vict. c. 132, as to what is meant by "East India Stock."

(*m*) *Hume v. Richardson*, 31 L. J. Ch. 713.

(*n*) *Ante*, 1394.

(*o*) 4 Russ. 195.

stock purchased were considerably greater than if the conversion had taken place at the end of a year from the testator's death. And it was held by Lord Gifford that the tenant for life was not entitled to the actual interest which the money yielded while it remained on the Indian security, but only to the dividends of so much three per cent. stock as would have been purchased with it at the end of a year from the testator's death; that the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest; and they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had, in fact, paid her, but only a sum equal to what she would have received for dividends if the money had been transferred from the Indian security and invested in the three per cent. stock at the end of a year from the testator's death. And this decision was confirmed, on appeal, by Lord Lyndhurst. In the case of *Mackenzie v. Taylor*, (*p*) where the testator gave his residuary personal estate to his executors, upon trust, as soon as convenient after his death, to convert into money and invest the same, and the executors allowed it to be enjoyed in specie by Mrs. M., the tenant for life, as long as she lived, but three years after her death they accounted for the value and paid it into court; it was held by Lord Langdale that they ought to pay interest at four per cent. from her death to the day of such payment. In *Wightwick v. Lord*, (*q*) in a case where the will gave no specific directions as to the payments of debts, the executor, who was also the ultimate residuary legatee, did not ascertain and secure the residue at the end of the year, but worked part of the property (a coal mine) to a profit for several years, when it ceased to be of any value; it was held, on a bill at the suit of a person having a charge for life on the residue, that the executor was not entitled to postpone the sale of the property to the prejudice of such person, and that having postponed it, he was chargeable with the value of the mine at the end of the year from the testator's death with interest thereon, and that that value must be calculated as constituted of the aggregate of the annual profits derived from the mine in all the subsequent years till it became unproductive, such annual profits to be treated as deferred payments.

(*p*) 7 Beav. 467.

(*q*) 6 H. L. Cas. 217.

But in *Baud v. Fardell* (r) it was held that an executrix, who was also tenant for life under a will directing the residuary estate to be sold and the proceeds invested in government or other good securities, was not liable for not converting into consols a sum of navy 5l. per cents. forming part of the residuary estate; for she had a discretion expressly reposed in her as to the nature of the investment.

Where trustees are bound by the terms of their trust to *invest the money in the public funds, and instead of doing so, they retain the money in their hands, or invest it upon an insufficient security, the *cestuis que trust* may elect to charge them either with the amount of the money, or with the amount of the stock which they might have purchased with the money. (s) Where, however, the trustees are not bound to invest the money in the public funds, or in any specific security, but by the terms of the trust have a discretion to invest it in various ways, the authorities were conflicting on the question whether, if the trustees fail to invest as prescribed, the *cestuis que trust* can claim to charge them with the value of some particular security that might have been obtained, or whether they are merely chargeable with the whole amount of the trust fund, together with interest. (t) But this question has been settled in favor of the latter view by the decision of the lords justices in *Robinson v. Robinson*. (u)

consequences of retaining in hand instead of investing; or of investing on a deficient security: [See stat. 22 & 23 Vict. c. 35, s. 31, *post*, 1828.]

This consideration leads to the question, how far an executor or administrator is liable, in respect of losses occasioned by not calling in the money of the testator already invested upon securities. Executors ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary. Accordingly, in *Powell v. Evans*, executors were charged with a loss caused by neglecting to call in money lent by the testator on bond. (v) So,

loss by not calling in money on securities, or in hands of banker:

(r) 7 De G., M. & G. 628.

(s) *Shepherd v. Moulis*, 4 Hare, 503, 504; *Pride v. Fooks*, 2 Beav. 430; 1 De G., M. & G. 256; [*Blauvelt v. Ackerman*, 5 C. E. Green, 141; *Darling v. Hammer*, 5 C. E. Green, 220; *McElhenny's Appeal*, 46 Penn. St. 347; *Ihmsen's Appeal*, 43 Penn. St. 471.]

(t) *Hockley v. Bantock*, 1 Russ. 141;

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Watts v. Girdlestone, 6 Beav. 188; *Ames v. Parkinson*, 7 Beav. 379, were in favor of the former view. *Marsh v. Hunter*, 6 Madd. 295, and *Shepherd v. Moulis*, 4 Hare, 500, of the latter.

(u) 1 De G., M. & G. 247. See, also, *Knott v. Cottee*, 16 Beav. 80, 81, by Romilly M. R.

(v) 5 Ves. 839. See, also, *ante*, 1806;

[1815]

in *Moyle v. Moyle*, (*x*) executors and trustees * who, for upwards of a year after the testator's death, allowed a considerable portion of the assets to be unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss. (*y*) So executors were held personally liable in respect of the loss to the testator's estate of a sum outstanding on personal security, although the security was that of a bond of the testator's solicitor, and the money had been invested in that security by the testator some years before his death, and by his will he directed that his trustees should get in his outstanding estate "as soon as conveniently might be" after his decease. (*z*) But in *Buxton v. Buxton*, (*a*) an executor who allowed part of a testator's assets to remain invested in Mexican bonds for a year and seven months after the testator's death, and eventually sold the bonds at a lower price than might have been obtained by a sale at an earlier period, but who appeared to have acted throughout with diligence and good faith, was held, by Sir C. C. Pepys M. R., under the circumstances, not to be liable for the loss consequent on his not having sold them sooner. (*a*¹) And his honor further held that a difference of opinion between two executors, as to the propriety of converting the assets at a particular period, followed by a demand made by one of them upon the other, to concur in effecting an immediate conversion, does not deprive the latter of the right to exercise his own discretion, or render him liable for the loss that may arise from the delay consequent on his

4 My. & Cr. 496, and *Eagleton v. Kingston*, 8 Ves. 466, 467; *Atty. Gen. v. Higham*, 2 Y. & Coll. C. C. 634. The money, when called in, should be invested in the three per cents. or other authorized fund, if there is no present occasion for it. See 7 Ves. 149, 150. This seems a sufficient answer to the inquiry of Lord Camden, in *Orr v. Newton*, 2 Cox, 276.

(*x*) 2 Russ. & My. 710.

(*y*) See *Johnson v. Newton*, 11 Hare, 168, 169.

(*z*) *Bullock v. Wheatley*, 1 Coll. 130.

(*a*) 1 My. & Cr. 80.

(*a*¹) [*McRae v. McRae*, 3 Bradf. Sur. 199. Where an executor negligently delayed to sell certain stock belonging to the testator's estate, until it had depreciated in value, and then suffered it to be sold

under execution at a price much below its former value; this was held to be waste and unfaithful administration, for which he was liable on his probate bond. *Brazer v. Clark*, 5 Pick. 96. See *Boyd v. Boyd*, 3 Grattan, 113. If an executor or administrator sells the goods of the deceased, under authority of the probate court, and conducts the sale in good faith, any loss upon the goods must fall upon those interested in the estate; but if he manages the sale in a manner likely to injure the sale of the goods, or is guilty of fraud and collusion in the sale, he is to be accountable for the appraised value of the goods, and the sale must be considered as made on his own account and at his own expense, and the loss will be his own. *Brackett v. Tillotson*, 4 N. H. 208.]

declining to comply with the demand. (b) Where executors have neglected to realize assets which are outstanding on an improper investment, there is no fixed period at which the loss is to be calculated. It depends on the particular nature of the property and the evidence affecting it. (c)

* It is not the duty of an executor to call in money invested on real security, where no risk is apparent; nor are executors bound to convert leasehold property into three per cent. stock, unless under particular circumstances. (d).

Generally speaking, if an executor appoints another to receive the money of his testator, and he receives it, it is the same thing as if the executor himself had actually received it, and will be assets in his hands; and, consequently, appointing another to receive, who will not repay, is a *devastavit*. (e) Thus, in a case where the will directed that one Edward Pistor should carry on the business of the testator to a given day, for the benefit of his estate, and the executors, from the confidence thus reposed by the testator in Pistor, permitted him to get in debts, without anything appearing on the will to show the testator's intention to that effect, the court of exchequer held that the executors must answer to the residuary legatee for the money so received by their agent. (f) So where trustees for sale sold the trust property and placed the conveyance executed by them and having their receipt indorsed, in the hands of a solicitor, who received and

loss by failure of banker, solicitor, &c. [See stat. 22 & 23 Vict. c. 35, s. 31, *post*, 1828.]

(b) See, also, *East v. East*, 5 Hare, 348; *Hughes v. Empson*, 22 Beav. 181.

(c) *Hughes v. Empson*, 22 Beav. 181. In this case losses were occasioned by the non-sale of Crystal Palace shares, which had fallen from a premium to a discount, and the executors were charged with the value at the end of twelve months.

(d) 7 Ves. 150; *ante*, 1393 *et seq.* As to whether turnpike bonds are real securities, see *Robinson v. Robinson*, 1 De G., M. & G. 247.

(e) *Jenkins v. Plombe*, 6 Mod. 93; [*Green v. Hanbury*, 2 Brock. 403; *Marshall v. Moore*, 2 T. B. Mon. 69; *Succession of Baum*, 9 La. Ann. 412. It was held in Illinois that an administrator, having in good faith employed an agent in

another state to collect a debt due to his intestate's estate, who, after collecting the same, appropriated it to his own use, is not liable for the amount collected, having been guilty of no misconduct. *Christy v. M'Bride*, 2 Ill. 75. As to the liability of an executor for the loss of money collected by an attorney on demands placed in his hands for that purpose, and misappropriated by him, see *Rayner v. Pearsall*, 3 John. 578. An executor will be liable for the loss when he employs an unsuitable or incompetent person to collect the debts due to the estate, and they are lost in consequence. *Wakeman v. Hazleton*, 3 Barb. Ch. 148.]

(f) *Pistor v. Dunbar*, 1 Anstr. 107.

misapplied the purchase-money, they were held liable for a breach of trust. (*g*) Again, where trustees left some exchequer bills, in which they had properly invested trust money, in the hands of a broker, they were held personally liable upon a misapplication of the bills by the broker. (*h*)

* But with respect to losses sustained by the failure of bankers, or other persons into whose hands the money of the testator has been deposited by the executor, the rule, at least in equity, seems to be, that where the deposit was made from necessity, or conformably to the common usage of mankind, the executor will not be responsible for the loss. (*i*) So if the executor, living in London, and receiving money of the testator, should remit to an attorney in the country to pay the debts there, and the attorney becomes insolvent, the executor will not be chargeable, if the business was transacted in the ordinary manner without any circumstances to show suspicion. (*k*) So where executors employ an auctioneer to sell the leaseholds, or other portion of the assets, who receives the deposit and fails to pay it over, the executors will not, generally speaking, be held personally liable for the loss. (*l*) But in *Darke v. Martyn*, (*m*) where a testator died in March, 1823, and in January, 1824, and January, 1825, the executors and trustees deposited part of the assets in the hands of bankers on their notes carrying interest; and the bankers failed in November, 1825; Lord Langdale M. R. held, that *as no necessity had been shown for such deposit*, the trustees were personally responsible for the loss. (*n*) So where a trustee deposited a trust fund with his bankers, accompanied by an order in writing to invest the money in consols, he was held answerable for the omis-

(*g*) *Ghost v. Waller*, 9 Beav. 497. See, also, *Bostock v. Floyer*, L. R. 1 Eq. 26; *Sutton v. Wilders*, L. R. 12 Eq. Cas. 373.

(*h*) *Matthews v. Brise*, 6 Beav. 239. See, also, *Rowland v. Witherden*, 3 Mac. & G. 568, and stat. 22 & 23 Vict. c. 35, s. 31, *post*, 1828.

(*i*) *Churchill v. Hobson*, 1 P. Wms. 243; *Knight v. Lord Plymouth*, 3 Atk. 480; S. C. 1 Dick. 120; *Ex parte Belchier*, Ambl. 219; *Rowth v. Howell*, 3 Ves. 565; *Adams v. Claxton*, 6 Ves. 226; *Wilks v. Groom*, 3 Drew. 584; *Swinfen*

v. Swinfen, 29 Beav. 211; *Johnson v. Newton*, 11 Hare, 160; *Mendes v. Guedalla*, 2 Johns. & H. 259; *Fenwicke v. Clarke*, 31 L. J. Ch. 728.

(*k*) *Bacon v. Bacon*, 5 Ves. 334, 335; *Castle v. Warland*, 32 Beav. 660; [*post*, 1826, 1827.]

(*l*) *Edmonds v. Peake*, 7 Beav. 239. See, also, stat. 22 & 23 Vict. c. 35, s. 31, *post*, 1828.

(*m*) 1 Beav. 525.

(*n*) See, also, *Rehden v. Westley*, 29 Beav. 213.

sion of the bankers to make the investment, where he made no subsequent inquiry respecting it, until about five months * afterwards, when the bankers became bankrupt. (o) And if an executor pays the money of the testator into a banker's, not on any distinct account, but *mixing it with his own money*, it should seem that the executor will be answerable for the loss sustained by the failure of the banker. (p)

The result of all the best authorities on this subject was thus stated by Lord Cottenham, in his judgment in the case of *Olough v. Bond*: (q) "Although a personal representative, acting strictly within the line of his duty and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, or for the insolvency or misconduct of any person who may have possessed it; (q¹) yet, if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or upon securities not authorized, or be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. (q²) Thus if he omit to sell property when it ought to be sold, and it be afterwards lost

General result of authorities as to the liability of executors for loss of assets.

(o) *Challen v. Shippam*, 4 Hare, 555.

(q) 3 My. & Cr. 496.

(p) *Wren v. Kirton*, 11 Ves. 377; *Fletcher v. Walker*, 3 Madd. 73; *Massey v. Banner*, 4 Madd. 413; S. C. 1 Jac. & W. 241; *Robinson v. Ward*, Ry. & Mood. 274; S. C. 2 C. & P. 59; [*Case v. Abeel*, 1 Paige, 393; *Kellett v. Rathbun*, 4 Paige, 102.] See, also, *Salway v. Salway*, 2 Russ. & My. 215, in which case Lord Brougham held (overruling the decision of Sir J. Leach M. R. 4 Russ. 60), that a receiver appointed by the court is answerable for the loss of moneys consequent on the failure of a banker with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control over the fund. This judgment was afterwards affirmed in *Dom. Proc. White v. Baugh*, 9 Bligh, 181.

(q¹) [*Ante*, 1804, note (y), 1806, note (g); *Watson v. Stone*, 40 Ala. 451; *Dockey v. McDonald*, 40 Ala. 476; *Neilson v. Cook*, 40 Ala. 498.]

(q²) [See *White v. Gardner*, 38 Texas, 407, a case of conversion of assets into Confederate money during the civil war, in which administrators were held liable for a *devastavit*. See, also, *Williams v. Buster*, 5 W. Va. 342; *Copeland v. McCue*, 5 W. Va. 264; *Sprowl's case*, 21 La. Ann. 544; *Kleberg v. Bonds*, 31 Texas, 611; *Pitts v. Singleton*, 44 Ala. 363. As to the liability of an administrator for taking pay for assets sold, in Confederate money, see *Williams v. Campbell*, 46 Miss. 57; *Trammel v. Philleo*, 33 Texas, 395.]

without any fault of is, he is liable ; (*r*) or if he leave money due upon personal security, which, though good at * the time, afterwards fails, (*s*) And the case is stronger if he be himself the author of the improper investment, as upon personal security, or an unauthorized fund. Thus, he is not liable, upon a proper investment in the three per cents., for loss occasioned by the fluctuations of that fund, (*t*) but he is for the fluctuations of any unauthorized fund. (*u*) So when the loss arises from the dishonesty or failure of any one to whom the possession of part of the estate has been intrusted. Necessity, which includes the regular course of business in administering the property, will, in equity, exonerate the personal representative. (*u*¹) But if without such necessity he be instrumental in giving to the person failing possession of any part of the property, he will be liable although the person possessing it be a co-executor or co-administrator." (*v*)

In what cases an executor is A *devastavit* by one of two executors or administrators shall not charge his companion, (*x*) provided he has

(*r*) Phillips v. Phillips, 2 Freem. 11 ; ante, 1804 ; Fry v. Fry, 27 Beav. 144 ; [Brazier v. Clark, 5 Pick. 96, stated ante, 1816, note (*a*¹).]

(*s*) Powell v. Evans, 5 Ves. 839 ; Tebbs v. Carpenter, 1 Madd. 290 ; ante, 1804, [1805, note (*e*), 1806, note (*g*).] See, also, 1815.

(*t*) Peat v. Crane, 3 Dick. 499, note ; ante, 1810, 1811. [Where an executor deposited funds in the state treasury, without an order of court, but it appeared that the funds would have perished if retained in his hands, the court refused to charge him with a loss by depreciation of the state securities. Morton v. Smith, 1 Desaus. 128.]

(*u*) Hancom v. Allen, 2 Dick. 498 ; Howe v. Lord Dartmouth, 7 Ves. 137 ; ante, 1811.

(*u*¹) [Hawley v. James, 5 Paige, 187 ; Lewis v. Reed, 11 Ind. 239 ; Blight v. Schenck, 10 Penn. St. 285. If the executor or administrator acts with proper diligence and in good faith, he is not liable for loss to the estate by the misconduct or insolvency of agents, whom it was necessary for him to employ in the course of his administration. Calhoun's Estate, 6 Watts, 185 ; cases cited above in this

note, and those cited post, 1827, note (*y*¹) ; Bacon v. Bacon, 5 Ves. 335 ; Clough v. Bond, 3 My. & Cr. 497 ; Joy v. Campbell, 1 Sch. & Lef. 341 ; Telford v. Barry, 1 Iowa, 591 ; ante, 1817, note (*e*).]

(*v*) Langford v. Gascoyne, 11 Ves. 333, post, 1824 ; Shipbrook v. Lord Hinchinbrook, 11 Ves. 252 ; 16 Ves. 477, post, 1824 ; Underwood v. Stevens, 1 Meriv. 712, post, 1830 ; Styles v. Guy, post, 1828 ; Trutch v. Lamprell, 20 Beav. 116. The following are cases bearing on the general principles above stated, viz : Bacon v. Clarke, 3 My. & Cr. 294 ; Lowry v. Fulton, 9 Sim. 115 ; Munch v. Cockerell, 9 Sim. 339 ; 5 My. & Cr. 178 ; Broadhurst v. Balguy, 1 Y. & Coll. C. C. 16 ; Booth v. Booth, 1 Beav. 125 ; Phillipson v. Gatty, 7 Hare, 516 ; Byrne v. Norcott, 13 Beav. 336 ; Garner v. Moore, 3 Drew. 277 ; Lander v. Weston, 3 Drew. 389 ; Collinson v. Lister, 20 Beav. 356 ; 7 De G., M. & G. 634 ; Gibbins v. Taylor, 22 Beav. 344 ; Selby v. Bowie, 4 Giff. 300 ; Griffith v. Porter, 25 Beav. 236 ; Fry v. Fry, 27 Beav. 144, 146.

(*x*) Wentw. Off. Ex. 306, 14th ed. ; Anon. Dyer, 210 a ; Hargthorpe v. Milforth, Cro. Eliz. 318 ; Williams v. Nixon,

not intentionally or otherwise contributed to it. For the testator's having misplaced his confidence in one shall not operate to the prejudice of the other. (y)

liable for
the *devas-*
tavit of
his co-
executor.

2 Beav. 472; [State v. Belin, 5 Harr. (Del.) 400; Ray v. Doughty, 4 Blackf. 115; Davis v. Walford, 2 Ind. 88; Hall v. Carter, 8 Geo. 388. It is well settled that the liability of joint administrators and co-executors is identical. Lewin Trusts (5th Eng. ed.), 224; *post*, 1836, note (i¹).]

(y) Cro. Eliz. 319. [In Ames v. Armstrong, 106 Mass. 18, Ames J. said: "Co-executors, even though numerous, are regarded in law as but one person. The acts of one, within the scope of his authority, in the administration of the estate, are the acts of all, with this qualification, that at common law each was responsible only for such assets as came to his own hands. Under ordinary circumstances, one of two or more executors was not to be held accountable for waste or other misconduct on the part of an associate. The misplaced confidence of the testator in the integrity or capacity of one of the number was not allowed to operate to the prejudice of another." *Ante*, 949. Where one executor merely permits his co-executor to take possession of the assets, without going further, and concurring in a misapplication of them, he does not render himself responsible for the receipts of his co-executor. See Williams v. Maitland, 1 Ired. Eq. 92; Hauser v. Lehman, 2 Ired. Eq. 594; Kerr v. Kirkpatrick, 8 Ired. Eq. 137; Worth v. McAden, 1 Dev. & Bat. Eq. 199; Clarke v. Blount, 2 Dev. Eq. 51; Ochiltree v. Wright, 1 Dev. & Bat. Eq. 336; Fennimore v. Fennimore, 3 N. J. Eq. 292; Fisher v. Skillman, 18 N. J. Eq. 229; Johnson v. Johnson, 2 Hill Ch. 277; Clarke v. Jenkins, 3 Rich. Eq. 318; Knox v. Pickett, 4 Desaus. 199; Lenoir v. Winn, 4 Desaus. '65; Mathews v. Mathews, 1 McMullan Eq. 410; Robinson's Estate, 7 Phil. (Penn.) 61; Sparhawk v. Buell, 9 Vt. 41; Cameron v. Justices, 1 Geo. 36; Hall v. Carter, 8 Geo. 388; Kerr v. Waters, 19 Geo. 136;

Clark v. Clark, 8 Paige, 152; Mesick v. Mesick, 7 Barb. 120; White v. Bullock, 20 Barb. 91; Banks v. Wilkes, 3 Sandf. 99; Sutherland v. Brush, 7 John. Ch. 17; Wood v. Brown, 34 N. Y. 337; Heath v. Allen, 1 A. K. Marsh. 442; Gaultney v. Nolan, 33 Miss. 569; Peter v. Beverley, 10 Peters, 532; Roach v. Hubbard, 6 Litt. 235; Manahan v. Gibbons, 19 John. 427; Call v. Ewing, 1 Blackf. 301; Brazer v. Clark, 5 Pick. 104; Royall v. M'Kenzie, 25 Ala. 363; Latrobe v. Tiernan, 2 Md. Ch. 474; 2 Story Eq. Jur. § 1283. The extent of the liability of one executor for the acts of his co-executor or co-executors, will depend very much upon the circumstances of each case. Fonte v. Horton, 36 Miss. 350; Noland v. Calvit, 20 Miss. 273; Clarke v. Blount, 2 Dev. Eq. 51. Each executor is, however, liable for his own acts of negligence or wrong, by which the estate of the deceased suffers loss or injury. See McDowall v. McDowall, 1 Bailey Eq. 324; Holcombe v. Holcombe, 13 N. J. Eq. 413; Irwin's Appeal, 35 Penn. St. 294; Weigand's Appeal, 28 Penn. St. 471; Hengst's Appeal, 24 Penn. St. 413; Blake v. Pegram, 109 Mass. 541, 552. At common law no bond was required of an executor, but his office was considered as a personal trust, resting in the confidence of the testator in the qualities which led to his selection for that special duty. And it sometimes happens that by the terms of the will executors are not required to furnish sureties upon the assumption of their trust. But in many of the American States, bonds with sureties are required by law as well of executors as of administrators; *ante*, 529, note (a¹); and in these cases, as well as in cases where bonds, though not required, are given voluntarily, in conformity with those required by law, if the executors give a joint and several bond, its effect is to make them jointly and severally liable to the judge of probate, as the trustees for creditors and

* Hence an executor shall not, under ordinary circumstances, be responsible for the assets come to the hands of his co-executor. (z) Hence, also, the circumstance that one of two executors

others interested in the estate, to the extent of assets which come to their joint possession. The authorities are clear that under such a bond, whatever may have been their common law rights, they are jointly responsible during the continuance of the joint executorship. *Brazer v. Clark*, 5 Pick. 96; *Newcomb v. Williams*, 9 Met. 525; *Towne v. Ammidown*, 20 Pick. 535; *Sparhawk v. Buell*, 9 Vt. 41; *Boyd v. Boyd*, 1 Watts, 365; *Newton v. Newton*, 53 N. H. 537; *Ames J. in Ames v. Armstrong*, 106 Mass. 18, 19; *Pearson v. Darrington*, 32 Ala. 227; *Bostick v. Elliott*, 3 Head, 507; *Braxton v. State*, 25 Ind. 82; *Clarke v. State*, 6 Gill & J. 288; *Morrow v. Peyton*, 8 Leigh, 54; *Jeffries v. Lawson*, 39 Miss. 791; *Anderson v. Miller*, 6 J. J. Marsh. 568. Neither executors nor administrators are required by law to enter into a joint bond; each may file a separate bond. *Ames J. in Ames v. Armstrong*, 106 Mass. 19. This is now provided by statute in Massachusetts. St. Mass. 1874, c. 366. And in case only separate bonds are given, the liability of an executor or administrator for the acts of maladministration of his co-executor or co-administrator, will be governed by the rules which are stated in the text, without reference to the bond. Where there were four joint executors upon an estate, who gave a joint bond, and two of them ultimately became insolvent, and one of the remaining two was compelled, under a decree of a court of chancery, to pay for property which, without fault or negligence on his part, had been wasted by one of the insolvent executors, prior to his becoming insolvent, it was held that the executor making such payment might recover from the other solvent executor one half of the amount so paid, and of all expenses incurred by him in defending the suit in chancery, in which the decision was made. *Marsh v. Harrington*, 18 Vt. 150. Two executors gave a joint and several

bond, with sureties, conditioned that the two should faithfully administer; one died and the survivor afterwards committed waste; and a judgment rendered on the bond against the survivor and his sureties was satisfied by the sureties; it was held that they had no right of action for indemnity or contribution against the heir or representative of the deceased executor. *Brazer v. Clark*, 5 Pick. 96. Parker C. J. in this case said: "By the tenor of their bond, the executors are bound only for the joint executorship; they may be answerable for all defalcations which accrue during that trust, and their estates are liable for the deficiencies, notwithstanding they have had no participation in the negligence or fraud; but they are not bound in this manner for acts or neglects which take place after their power has ceased. The survivor succeeds to the whole authority and power, and he alone, and those who are sureties for him, are responsible." Upon the claim that the estate of the deceased executor was at least liable on the ground of suretyship, he being to be considered in the light of a surety, the learned judge said: "But this would be changing the character of his engagement. He was principal in the bond, and liable as such, and when discharged from that liability he incurred no other." A similar decision was made in *Towne v. Ammidown*, 20 Pick. 535, on the authority of *Brazer v. Clark*, *supra*.]

(z) *Cro. Eliz.* 319; *Littlehales v. Gascoyne*, 3 Bro. C. C. 74; *Williams v. Nixon*, 2 Beav. 472; *Dix v. Burford*, 19 Beav. 412, by Romilly M. R.; [*Moore v. Tandy*, 3 Bibb, 97; *Gaultney v. Nolan*, 33 Miss. 569; *Williams v. Holden*, 4 Wend. 223; *Douglas v. Satterlee*, 14 John. 16; *Call v. Ewing*, 1 Blackf. 301; *Nettman v. Schramm*, 23 Iowa, 521; *Brazer v. Clark*, 5 Pick. 96; *Newcomb v. Williams*, 9 Met. 525; *Ames J. in Ames v. Armstrong*, 106 Mass. 18; *Stell's Appeal*, 10 Penn. St.

had notice of the existence of a debt of superior degree, which he concealed from his co-executor, shall not affect the latter so as to make him guilty of a *devastavit* by paying an inferior debt; (a) though, perhaps, if notice to one executor be proved, and nothing more appears, it shall be presumed that he communicated it to his co-executor. (b)

But where an executor, possessing assets of his testator, hands over those assets to a co-executor, and they are misapplied by that co-executor, there the executor, who so hands them over, shall be answerable for their misapplication, unless he can show a good reason for having so acted. (c)

The rule may, perhaps, be stated to be, that where, by any act done by one executor, any part of the representative estate comes to the hands of his co-executor, the former * will be answerable for the latter, in the same manner as he would have been for a stranger, whom he had intrusted to receive it. (d)

152, 153.] See *infra*, pt. v. bk. II. ch. I., as to a finding by a jury, upon a plea of *plene administravit* by several executors, that one only had assets. See, also, stat. 22 & 23 Vict. c. 35, s. 31, *post*, 1828.

(a) *Hawkins v. Day*, Ambl. 162; S. P. S. C. 1 Dick. 157.

(b) Ambl. 162. See *Timson v. Ramsbottom*, 2 Keen, 35; *Smith v. Smith*, 2 Cr. & M. 231; *Meux v. Bell*, 1 Hare, 73.

(c) *Townsend v. Barber*, Dick. 356; *Macpherson v. Macpherson*, 1 Macq. H. of L. 243; [*Sparhawk v. Buell*, 9 Vt. 41; *Sterrett's Appeal*, 2 Penn. 419; *Edmonds v. Crenshaw*, 14 Peters, 166; *Worth v. M'Aden*, 1 Dev. & Bat. Eq. 199.] However, in the case of *Davis v. Spurling*, 1 Russ. & My. 66, an executor was employed by his co-executor as his agent to sell an estate which, under the will of the testator, the co-executor alone had power to sell. The executor so employed handed over the price of the estate to the co-executor, who afterwards misapplied it. And Sir John Leach M. R. held that although, by the will of the testator, the price of the estate when sold was to be considered as part of his personal estate, yet the executor, so handing it over, was not accountable for the misapplication of it; inas-

much as he had no legal right to retain it; for it was in his hands, not as executor, but simply as agent of his co-executor, who alone had power to sell the estate, and to receive the price of it. [See, also, as to the difference between the rights of legatees and of creditors, in such cases, *Verner's Estate*, 6 Watts, 250.]

(d) See Mr. Cox's note to *Churchill v. Hobson*, 1 P. Wms. 241, and Lord Thurlow's judgment in *Sadler v. Hobbs*, 2 Bro. C. C. 117; [*Lewin Trusts* (5th Eng. ed.), 222, 223; *Mumford v. Murray*, 6 John. Ch. 1] Accordingly, in *Home v. Pringle*, 8 Cl. & Fin. 264, 268, the rule was stated to be that the appointment of one of several trustees to manage the property would not *per se* make the other trustees responsible for his acts; but it would make the trustee so appointed the agent of the other trustees for those purposes, and render them responsible for his acts, so far as they would have been responsible for the acts or receipts of a stranger. See, also, *Toplis v. Hurrell*, 19 Beav. 423, where the rule here stated was adopted by Romilly M. R. See, also, *Candler v. Tillett*, 22 Beav. 263; *Cowell v. Gatcombe*, 27 Beav. 568; *Ingle v. Partridge*, 32 Beav. 661; [*Styles v. Guy*, 1 Mac. & G. 422.]

[1822]

But if an executor is merely passive, by not obstructing his co-executor from getting the assets into his possession, the former is not responsible. (*e*) If, however, the one in any way contributes to enable the other to obtain possession, he is answerable, notwithstanding his motive be innocent, unless he can assign a sufficient excuse. (*f*) Thus, in the case of several executors, if, by agreement among themselves, one is to receive and intermeddle with such part of the estate, and another with such a part, each of them will be chargeable for the whole; because the receipts of each are pursuant to the agreement made between them. (*g*) So where A., B., C., D., and E. (the two latter being married women) took out administration to an intestate, and afterwards appointed C. to be the acting administrator, and * directed the creditors to pay their debts to him; and C. became insolvent; it was held that A., B., and the husbands of D. and E., were responsible for C.'s receipts. (*h*) So where a man made several executors, who all joined in the sale of the testator's goods, but one only received the money, and he became insolvent; it was holden that they should all be charged. (*i*)

Accordingly, an executor, having a fund standing in the joint names of himself and another, cannot, upon the mere represen-

(*e*) *Langford v. Gascoyne*, 11 Ves. 335; *Candler v. Tillett*, 22 Beav. 257; [*Sterrett's Appeal*, 2 Penn. 419.] This, it should seem, applies only to cases where the question arises under a decree for the common accounts, and not under a special charge against the executor for wilful neglect and default. *Terrell v. Mathew*, 1 Mac. & G. 433, note (*a*). (See, also, the remarks of the reporters of that case, *Ib.*) He would clearly be liable if he stood by and saw his co-executor commit a breach of duty. See the cases cited *post*, 1827.

(*f*) 11 Ves. 335; *Hewett v. Foster*, 6 Beav. 259; *Broadhurst v. Balguy*, 1 Y. & Coll. C. C. 16. See, also, the cases collected in note (*d*); [*Stewart v. Conner*, 9 Ala. 803; *Wayman v. Jones*, 4 Md. Ch. 500; *Estate of Mary Evans*, 2 Ashm. 470; *Clark v. Clark*, 8 Paige, 153; *Schenck v. Schenck*, 1 Green (N. J.), 174; *Hall v. Carter*, 8 Geo. 388; *Mesick v. Mesick*, 7 Barb. 120; *Edmonds v. Crenshaw*, 14 Peters, 166.]

(*g*) *Gill v. Atty. Gen.* Hardr. 314. ["Even according to the common law, whenever any part of the estate, by any act or agreement of one executor, passes or is intrusted to the custody of a co-executor, they are thereby rendered jointly responsible. In such a case it would be inferred that there had been a joint possession or custody, and that one executor, having power and opportunity to make it secure, had yielded the control to the other." *Ames J. in Ames v. Armstrong*, 106 Mass. 18. See *Monell v. Monell*, 5 John. Ch. 283, 296; *Sterrett's Appeal*, 2 Penn. 419; *Edmonds v. Crenshaw*, 14 Peters, 166; *Roberts v. Thomas*, 32 Geo. 31; *M'Nair's Appeal*, 4 Rawle, 154; *Buntin's Appeal*, 4 Watts & S. 469; *Ducommun's Appeal*, 17 Penn. St. 268.]

(*h*) *Lees v. Sanderson*, 4 Sim. 28.

(*i*) *Aplyn v. Brewer*, Prec. Chan. 173; *Burrows v. Walls*, 5 De G., M. & G. 233.

tation of the co-executor, if false, be justified in doing an act that is an exercise of power over that fund. First, the act must be necessary for the purposes of the will, and then the person to whom the representation is made has imposed upon him at least ordinary and reasonable diligence to inquire whether the representation is true. (*k*)

Also, if an executor has been dealing with the assets a considerable time, much beyond that period in which, according to the ordinary course, the debts would be paid, and he applies to the other executor to have a fund put into his hands exclusively, and the other does inquire, and satisfies himself that there are debts unpaid, and the real purpose of the executor making the application was to apply the fund to the discharge of debts; if it turns out afterwards that he had in his own hands a fund sufficient for the payment of those debts, and therefore the application of the other fund to that purpose was unnecessary, and that fund was not in fact devoted to the purpose for which it was provided, it would be impossible for the executor, who parted with it, to discharge himself. He would be subject to the imputation of negligence, as having been too easy with his co-executor; too remiss in not asking how he had been dealing with the assets in his hands. (*l*)

* Upon these principles, Lord Eldon held, in *Shipbrook v. Hinchinbrook*, (*m*) that where executors joined in a transfer of stock, vested in the name of all the executors, to a co-executor, upon his groundless representation that it was required for debts, the executors were answerable for the whole of the produce of the stock which they could not prove to have been applied by the co-executor to the payment of debts of the testator. (*n*) But his lordship further held that they were not liable so far as they could prove the application to that purpose, although he possessed other funds, part of the assets, not through them, which funds he wasted.

Again, in *Langford v. Gascoyne*, (*o*) it appeared from the affi-

(*k*) 11 Ves. 254; *Hewett v. Foster*, 6 Beav. 259; *Broadhurst v. Balguy*, 1 Y. & Coll. C. C. 16.

(*l*) 11 Ves. 254. See, also, *Mendes v. Guedella*, 2 Johns. & H. 259; [*Clark v. Clark*, 8 Paige, 152.]

(*m*) 11 Ves. 252; S. C. 16 Ves. 477.

(*n*) See, also, *Chambers v. Minchin*, 7 Ves. 186; *Underwood v. Stevens*, 1 Meriv. 713; *Williams v. Nixon*, 2 Beav. 472; *Hewett v. Foster*, 6 Beav. 259; *Broadhurst v. Balguy*, 1 Y. & Coll. C. C. 16.

(*o*) 11 Ves. 333.

davit of a witness, that on the day after the testator's funeral, his three executors, Gascoyne, Spurrell, and Lambert, met at his house, and his widow, being present, left the room to fetch a bag of money. Upon her return with it, she asked the witness to which of the executors she should deliver it; and the witness not then having a good opinion of Gascoyne's circumstances, advised her to give it to Spurrell; upon which, she passed by Gascoyne and Lambert, who were sitting near the door, and gave the bag into the hands of Spurrell, who counted the money over, and then delivered it into the hands of Gascoyne. The witness further stated, that at that time Gascoyne was not reputed to be in good circumstances. And Sir Wm. Grant held that the money must be considered to have been so far in the hands of Spurrell, that he was answerable for what afterwards became of it; but that as to the other executor, Lambert, it was impossible to charge him; for that he had neither done nor said anything that in any degree contributed to the loss of the money, or to its getting into the hands of Gascoyne. And his honor observed, that it was * not incumbent in one executor by force to prevent the money getting into the hands of another. (o¹)

So, in *Moses v. Levi*, (p) a testatrix bequeathed the residue of her property to certain persons, some of whom lived in the west of England, and others in Norfolk, and she appointed two persons to be executors, one of whom lived at Clifton, and the other at Diss. The executors, having paid all the debts and specific legacies of the testatrix, entered into an arrangement by which the Clifton executor was to pay the residuary legatees in the west of England, and the Diss executor those in Norfolk; and the residuary funds were apportioned between them for that purpose. The Diss executor made default in payment of one of the legatees in that neighborhood. And Alderson B. held that the other executor was responsible for the default.

But if one executor places the property of the testator in the hands of the other, who happens to be a banker, or in such a situation that the act is not imprudent, the executor so depositing

(o¹) [And so, where funds have properly come to the hands of one executor, his co-executor is not liable therefor merely in consequence of omitting to withdraw, or attempting to withdraw the funds from the hands of the executor who received them, upon notice of his insolvency. *Worth v. M'Aden*, 1 Dev. & Bat. Eq. 199.]
(p) 3 Y. & Coll. 359.

shall not be charged in case of a loss; for if he had been a sole executor, and had, under the same circumstances, placed the money in a banker's hands, he would not have been liable. (*q*) So if an executor in the country executes a power of attorney to a co-executor in town for the purpose of changing a fund of the testator, as the court would order it to be changed, as from the Long Annuities to three per cents. the act is justifiable, being for a purpose belonging to the administration of assets; but not to change it to bank stock. (*r*) So, in *Bacon v. Bacon*, (*s*) where an executor, living in London, paid money to his co-executor, who had been the confidential agent and attorney of the testator, for the purpose of paying debts in the country where he resided, and the money was lost by his insolvency, Lord *Loughborough held that the executor who had paid the money under such circumstances should not be charged with the loss. (*t*)

Again, it has been held that one executor is not answerable for the receipt of the other, merely by taking probate, permitting the other to possess the assets, and joining in acts necessary to enable him to administer. (*u*) Accordingly, where a bill of exchange was remitted to two agents, payable to them personally, who, on

(*q*) *Churchill v. Hobson*, 1 P. Wms. 241; *Chambers v. Minchin*, 7 Ves. 198. See, also, *Atty. Gen. v. Randell*, MS. Rep. 21 Vin. Abr. 534, tit. Trust, N. a, pl. 9. [*Daly's Estate*, 1 Tuck. N. Y. Sur. 95. Neither does a trustee, by being cashier to the trust estate, incur any additional liability in respect of its management beyond what he was subject to as trustee. *Home v. Pringle*, 8 Cl. & Fin. 264.]

(*r*) *Chambers v. Minchin*, 7 Ves. 193, by Lord Eldon. See *ante*, 1810-1812.

(*s*) 5 Ves. 331.

(*t*) This decision was approved of by Lord Eldon, in *Chambers v. Minchin*, 7 Ves. 193. See *Davis v. Spurling*, 1 Russ. & My. 66, where Sir John Leach M. R. intimates that an executor handing over assets to his co-executor for the express payment of a particular debt, will not be answerable for their misapplication. See, also, *Castle v. Warland*, 32 Beav. 660. But in *Hanbury v. Kirkland*, 3 Sim. 265, on a marriage, a sum of stock was settled for the separate use of the wife for life, re-

mainder for the husband for life, remainder for their children, with power to change securities with consent of the wife. The dividends on the stock being reduced, one of the trustees, in whom the husband and wife principally confided, and who, with his partners, was their solicitor, informed his co-trustees that he had an opportunity of investing the property in a mortgage at five per cent., and, with the consent of the husband and wife, requested his co-trustees to execute a power of attorney to enable him to sell the stock. The co-trustees, without inquiring into the matter, complied. The trustees sold the stock and absconded. And Sir L. Shadwell V. C. held, that the co-trustees were liable. See, also, accord. *Broadhurst v. Balguy*, 1 Y. & Coll. C. C. 16; *Trutch v. Lamprell*, 20 Beav. 116.

(*u*) *Hovey v. Blakeman*, 4 Ves. 596; [*ante*, 1820, note (*y*); *Lewin Trusts* (5th Eng. ed.), 222, 223.] But see *ante*, 1822, note (*e*), and *Styles v. Guy*, *post*, 1828.

the death of the principal, became his executors, Lord Alvanley held that the mere indorsement of one, after they were executors, in order to enable the other to receive the money, was not sufficient to charge him who did not receive it. (x) So it was laid down by Lord Redesdale, in *Joy v. Campbell*, (y) that if an executor, living in London, remits money to his co-executor to pay debts in Suffolk, "he is considered to do this of necessity; he could not transact business without trusting some persons, and it would be impossible for him to discharge his * duty, if he is made responsible where he remitted to a person to whom he would have given credit, and would in his own business have remitted money in the same way. It would be the same, were one executor in India, and another in England, the assets being in India, but to be applied in England; there the co-executor is appointed for the purpose of carrying on such transactions; and the executor is not responsible; for he must remit to somebody, and he cannot be wrong if he remits to the person in whom the testator himself reposed confidence." (y¹)

But the rule, it should seem, is different at law. Thus, in *Cross v. Smith*, (z) it was held that an executor administering, having once received money, assets of his testator, could not discharge himself, under a plea of *plene administravit* to an action by a bond creditor, by showing that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt.

It may here be mentioned, that by the established rules of courts of equity, it is the duty of all executors to watch over, and, if necessary, to correct the conduct of each other; and that an executor as well as a trustee, who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust. (a)

(x) 4 Ves. 608, 609.

(y) 1 Sch. & Lef. 341.

(y¹) [See *Deaderick v. Cantrell*, 10 Yerger, 254; *Thomas v. Scruggs*, 10 Yerger, 401; *Barrings v. Willing*, 4 Wash. C. C. 251; *Maccubbin v. Cromwell*, 7 Gill & J. 157; *Jones's Appeal*, 8 Watts & S. 147.]

(z) 7 East, 246.

(a) *Styles v. Guy*, 1 Mac. & G. 433, by Lord Cottenham; *Williams v. Nixon*, 2 Beav. 475, by Lord Langdale; *Horton v. Brocklehurst*, 29 Beav. 510, by Romilly M. R.; [*Wood v. Brown*, 34 N. Y. 137; *Heath v. Allen*, 1 A. K. Marsh. 442; *Clark v. Clark*, 8 Paige, 153; *Estate of Mary Evans*, 2 Ashm. 470; *Johnson v.*

Accordingly, in *Booth v. Booth*, (*b*) a testator bequeathed to his partner and to one Batkin, his personal estate, upon trust to invest the same for the benefit of his wife and children. Both the executors proved the will, and the surviving partner retained the testator's moneys in the trade, which were lost. Batkin took no active part in the trusts, but was cognizant of the breach of trust, and took no proceedings to prevent it. And * Lord Langdale M. R. held that Batkin was responsible for the consequences of the breach of trust. So, in *Lincoln v. Wright*, (*c*) two executors, permitting their co-executor to retain in his hands the ascertained residue, were held by the same learned judge to be liable for a breach of trust. Again, in *Styles v. Guy*, (*d*) where two of three executors, with the knowledge that there were unsettled accounts subsisting at the testator's death between him and their co-executor, in which they had reason to believe that the latter was considerably indebted to the estate, took no effectual measures to compel him to account and pay or secure the balance for several years, at the end of which he became bankrupt, Lord Cottenham held that the solvent executors (who were unable to prove that an attempt to recover the money at an earlier period would have been fruitless) were responsible for the loss, as having been occasioned by their wilful neglect and default. (*e*)

In cases of the description lately above considered, a trustee or executor will not be protected by the usual indemnity clause, exonerating him from all responsibility on account of the acts of his co-trustees or co-executors. (*f*)

not precluded by the usual indemnity clause.

By stat. 22 & 23 Vict. c. 35, s. 31, it is enacted that "every

Corbett, 11 Paige, 265; *Kincade v. Conley*, 64 N. Car. 387.]

(*b*) 1 Beav. 125.

(*c*) 4 Beav. 427.

(*d*) 1 Mac. & G. 422.

(*e*) See, also, *Egbert v. Butter*, 21 Beav. 560; *Candler v. Tillett*, 22 Beav. 257; [*Weigand's Appeal*, 28 Penn. St. 471; *Scully v. Delany*, 2 Ir. Eq. 165; *Hengst's Appeal*, 24 Penn. St. 413; 2 Story Eq. Jur. § 1284; *Jones's Appeal*, 8 Watts & S. 143; *Wayman v. Jones*, 4 Md. Ch. 500; *Clark v. Clark*, 8 Paige, 153.]

(*f*) *Mucklow v. Fuller*, Jacob. 198. See, also, *Underwood v. Stevens*, 1 Meriv.

712; *Hanbury v. Kirkland*, 3 Sim. 265; *Williams v. Nixon*, 2 Beav. 472; *Dix v. Burford*, 19 Beav. 409; *Brumridge v. Brumridge*, 27 Beav. 5. But where the will provided that any trustee who shall pay to his co-trustee, or enable him to receive moneys, for the general purposes of the will, should not be obliged to see to due application thereof or be responsible by express or implied notice of the misapplication, it was held that this was a good answer to a bill against two of three trustees to make good trust moneys which they had allowed their co-trustee to receive. *Wilkins v. Hogg*, 3 Giff. 116.

deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain * a clause in the words or to the effect following; that is to say, That the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such moneys, stocks, funds, and securities, as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument."

22 & 23
Vict. c. 35,
s. 31.
Every trust
instrument
to be
deemed to
contain
clauses for
the indem-
nity as to
loss of as-
sets and
reimburse-
ment of the
trustees.

It may here be observed, that if an executor administers part of the assets, he shall be charged with such as he has received, although he has renounced the executorship, and paid the money to a co-executor who proved will. (g) For executors must either wholly renounce, or if they act to a certain extent as executors, and take upon them that character, they can be discharged only by administering the assets themselves, or by putting the administration into the hands of a court of equity. (h) Thus, in *Doyle v. Blake*, (i) A., named executor in a will, acted on behalf of particular legatees, disclaiming an intention of interfering generally. He afterwards renounced formally in favor of B. who was named a trustee in the same will, who thereupon obtained administration *cum testamento annexo*. B. possessed himself * of the assets, and afterwards died insolvent. And it was held that A. was liable, as executor, not-

Liability of
an execu-
tor who re-
nounces
after an act
of admin-
istration.

(g) *Read v. Truelove*, Ambl. 417. [One of several administrators removed from office is not liable for acts done after his removal. *Marsh v. People*, 15 Ill. 284.]

(h) 2 Sch. & Lef. 345. See *Riky v. Kemmis*, 1 Lloyd & Goold, 101; *Herton v. Brocklehurst*, 29 Beav. 504.

(i) 2 Sch. & Lef. 231.

withstanding his renunciation; and was answerable for the acts of B., it appearing that he had a control over the assets, and B. being considered as having obtained possession thereof by his means. So in *Underwood v. Stevens*, (*k*) one of two executors and trustees did not act, otherwise than by joining with his co-executor and trustee in the sale of stock, under a representation that the sale was necessary for payment of debts, which it was not; the produce was received by the latter, and the greater part applied by him to his own private purposes. And the first executor was held chargeable for the amount, except so far as any part was applied to the trust purposes; together with interest at four per cent.; notwithstanding the parties beneficially interested consented to and approved of the sale, under a similar misrepresentation. Again, in *Rogers v. Frank*, (*l*) the defendant, named in the will as executor, did not prove the will, but before he renounced, he collected large sums belonging to the estate of the testator. And it was held that he was liable to be sued in equity in the character of executor by the legatees under the will, one of whom was also executrix, and had proved the will. (*m*)

But an executor, who has not proved, is not to be considered as acting, by assisting a co-executor who has proved, in writing letters to collect debts, or by writing directly to a debtor of the testator, and requiring payment. (*n*) So, if one of two persons named executors disclaims and renounces, who afterwards possesses himself of assets as agent to the other, who has proved the will, the former does not thereby become accountable as executor. (*o*) So in *Stacy v. Elph*, (*p*) a person named as executor and trustee * under a will did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate; but he purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended upon the disclaimer of the trust. During the life of the acting executrix, however, he interfered in the disposition of the

(*k*) 1 Meriv. 712.(*l*) 1 Y. & Jerv. 409.(*m*) See, also, *Harrison v. Graham*, 104. stated *infra*, 1831.(*n*) *Orr v. Newton*, 2 Cox, 274.(*o*) *Dove v. Everard*, 1 Russ. & My. 231. See, also, *Lowry v. Fulton*, 9 Sim.(*p*) 1 My. & K. 195.

testator's property, as her friend or agent; and it was held that he was not, under the circumstances, chargeable as executor or trustee. But in *Harrison v. Graham* (*q*) the case was as follows: Barbara Graham by will appointed her mother, her sisters Margaret and Elizabeth, and her brother Robert, her executors, and died. Margaret alone proved the will, and acted chiefly as executrix, and was described as the only acting one, in a letter of attorney executed by the others, who were therein described as executors, to empower Margaret to receive a quantity of stock. Robert, by virtue of another letter of attorney, executed by the other executors, transferred a quantity of the testatrix's S. S. stock, received the money, and paid it over the same day to Margaret. After this she and the mother died, making Robert their executor. It did not appear that Robert had, under the first executorship, done any other act as executor, besides giving the one letter of attorney and receiving the other. The question was, whether this was such an act of administration in Robert, as should make him chargeable as to his own estate. The master had charged him, and the case came on, upon exceptions to the report. Lord Hardwicke: "The question in the case is, whether or no this defendant had acted as an executor, and consequently whether he is chargeable? I agree that there may be cases where an executor may act as an attorney to the other executors. If an executor renounces, and then acts under a letter of attorney, it is no administration; for it depends on the nature of the act, accompanied * with any other acts. Here is a will and four executors. The will is proved by one only, with a reservation of the rights of the other three. Here appear to have been acts done by them all, and a letter of attorney given by the defendant, together with the other executors, to Margaret, who indeed is described therein as the only acting executrix. But the defendant describes himself there as an executor. This was clearly acting as an executor. Then he afterwards accepts another letter of attorney from Margaret, and the rest of the executors. Shall executors be allowed to discharge themselves at their pleasure from being liable to assets? Money comes into his hands, he pays it over to Margaret; this cannot discharge him." (*r*)

(*q*) 3 Hill's MSS. 239; 1 P. Wms. 241, Coll. C. C. 370; and the cases collected note (*y*) to 6th ed. *ante*, 279-281.

(*r*) See, also, *James v. Frearson*, 1 Y. &

[1832]

It is a general rule, that where an executor has once proved the will, he cannot renounce his representative character, and act under another. He can do no act in regard to the estate for which he is not answerable as executor. In the case of *Graham v. Keble*, (s) a partner in a house of agency in India, where a deposit was made in trust for a particular purpose, was made one of the executors of him who made the deposit, and proved the will. A power of attorney was sent from the executors in Europe, to the house of agency, for them to act under. But it was held that as the partner named executor had proved the will, the house could only act under his authority, and that he himself could not renounce the executorship and act in another character. But a co-executor, who proved, but never acted, cannot be charged by reason of the mere circumstance that he received a letter by the post from a debtor to the estate, inclosing a bill of exchange on account of his debt, which bill the co-executor immediately sent to the acting executor, who afterwards became insolvent. (t)

Liability of an executor who has proved, but declines to act as executor.

The most difficult point connected with this subject is with regard to the liability of an executor who merely joins * his co-executor in an act which might have been done with equal validity by the co-executor alone. At one period, a well recognized distinction on this head existed between trustees and executors. This distinction was founded on the difference between the power and authority of a co-trustee, and that of a joint executor, viz, that trustees cannot act separately as executors may, but must join both in conveyances and receipts; and therefore it may be taken that a co-trustee joins only for conformity. But a co-executor, as it is not necessary for him to join, interferes in the transaction unnecessarily; he was, therefore, to be considered as assuming a power over the fund, and consequently answerable for its application, as far as it was connected with the particular transaction in which he joined. Therefore the rule was, that where the executors joined in a receipt, both having the whole power over the whole fund, both were chargeable; where trustees joined, each not having the whole power, and the joining being necessary, only the person receiving the money was chargeable. (u) But this rule was much

Liability of a co-executor joining in a receipt.

(s) 2 Dow. P. C. 17.

(t) *Balchen v. Scott*, 2 Ves. jr. 678.

(u) *Aplyn v. Brewer*, Prec. Chan. 173;

Murrell v. Cox, 2 Vern. 570; Treat. Eq.

relaxed in favor of executors, by the opinion expressed by Lord Harcourt in *Churchill v. Hobson*, (*x*) and by the decision of Lord Northington in *Westley v. Clarke*, (*y*) which latter case was expressly approved of by Lord Alvanley in *Hovey v. Blakeman*. (*z*) Again, in *Scurfield v. Howes*, (*a*) the last mentioned judge observed, that he dissented from the rule, as broadly stated, that if one executor receives the money, and two sign the receipt, both are *chargeable, *if it appear that the second joined for conformity only*. (*b*)

In *Westley v. Clarke*, as Lord Thurlow observed in giving judgment in the case of *Sadler v. Hobbs, Thompson*, one of the executors, had actually received the money without the concurrence of the co-executors, and they signed the receipt afterwards; and that, therefore, was not an act which put it in the power of Thompson to get at the money, since, in fact, he had it at the time; and his lordship added, that, according to a note in that case, with which he had been furnished by the then master of the rolls (Sir L. Kenyon), Lord Northington said he should have thought the co-executors liable, if they had been present at the time when the money was paid. (*c*) And Lord Redesdale, in *Joy v. Campbell*, (*d*) took the distinction to be, that if a receipt be given for the mere purposes of form, then the signing will not charge the person not receiving; but if it be given under circumstances purporting that the money, though not actually received

bk. 2, c. 7, s. 5; *Darwell v. Darwell*, 2 Eq. Cas. Abr. 456, pl. 5; *Fellows v. Mitchell*, 1 P. Wms. 83; *Ex parte Belchier*, Ambl. 219; *Leigh v. Barry*, 3 Atk. 584; *Chambers v. Minchin*, 7 Ves. 198; *Brice v. Stokes*, 11 Ves. 324; *Gregory v. Gregory*, 2 Y. & Coll. 315, 316; [*Hall v. Carter*, 8 Geo. 388; *Sterrett's Appeal*, 2 Penn. St. 219; *Jones's Appeal*, 8 Watts & S. 143; *Johnson v. Johnson*, 2 Hill Eq. 290; *Clarke v. Jenkins*, 3 Rich. Eq. 318; *Monell v. Monell*, 5 John. Ch. 283; *Monahan v. Gibbons*, 19 John. 427. If an executor joins his co-executor in executing a power of sale, given in the will, he will be responsible for the appropriation of the proceeds, although the co-executor received all the money. *Ochiltree v. Wright*, 1 Dev. & Bat. Eq. 336; *Hauser v. Lehman*, 2

Ired. Eq. 594; *Deaderick v. Cantrell*, 10 Yerger, 263; *Johnson v. Johnson*, 2 Hill Eq. 277; *Mathews v. Mathews*, 1 McMullan Eq. 410.]

(*x*) 1 P. Wms. 243.

(*y*) 1 Eden, 357; S. C. 1 P. Wms. 82, note by Mr. Cox. See, also, the observations of the lord keeper in *Harden v. Parsons*, 1 Eden, 147, 148.

(*z*) 4 Ves. 608.

(*a*) 3 Bro. C. C. 95, according to the report from Lord Colchester's MSS. in Belt's edition.

(*b*) See accord. In re Fryer, *Martindale v. Picquot*, 3 Kay & J. 317; [*Lewin Trusts* (5th Eng. ed.), 219 *et seq.*]

(*c*) 1 P. Wms. 241, note by Cox.

(*d*) 1 Sch. & Lef. 341.

by both executors, was under the control of both, such a receipt shall charge; and the true question in all those cases seems to have been, whether the money was under the control of both executors; if it was so considered by the person paying the money, then the joining in the receipt by the executor who did not actually receive it, amounted to a direction to pay his co-executor; for it could have no other meaning; he became responsible for the application of the money, just as if he had received it. (e) Again, in *Doyle v. Blake*, (f) the same learned judge observed, that “where executors have been jointly charged where one only has received the money, and the other joined in the receipt, it has been on the ground that the property was under the control of both. That is, where two *executors joined in the receipt to a debtor for a sum of money, though the receipt of one would have been a discharge to the debtor, yet, they joining in the discharge, the debtor is taken to have paid to them both; his requiring the discharge of the executor, who has not received the money, amounts to saying, ‘I make this payment to you both, and not to him only who actually received the money.’ The true consideration in a question of this kind is, whether the executor, who merely joins in the receipt, had a control, and his joining in the receipt is evidence of that control, although the money was actually received by the other. I believe, if the case of *Westley v. Clarke* were seen with all the circumstances that were before Lord Northington, we should find that he meant to establish no more than this: that the mere joining in the receipt should not have the conclusive effect of charging both.”

The relaxation of the rule in favor of executors has been lamented by Lord Eldon on several occasions, (g) so much so as to lead to doubts whether the original rule must not be considered as reestablished. (h) But his lordship, when last he had an opportunity to consider the rule, (i) alludes to its alteration as having been completely effected. “Executors seem formerly to

(e) See accord. *Gregory v. Gregory*, 2 Y. & Coll. 316, per Alderson B.; [*Stewart v. Conner*, 9 Ala. 803.]

(f) 2 Sch. & Lef. 242.

(g) *Chambers v. Minchin*, 7 East, 198; *Brice v. Stokes*, 11 Ves. 324; *Shipbrook v. Hinchinbrook*, 16 Ves. 479. A simpler rule, said his lordship, never existed, than

that if an executor acts without necessity, he takes the power over the fund; and he shall not say he has not the power over it. 7 Ves. 199.

(h) See 1 Eden, 360, note (b) by Lord Henley; 2 Bro. C. C. 114, note (1) by Mr. Belt.

(i) *Walker v. Symons*, 3 Swanst. 64.

have been charged on much stricter principles, if they joined unnecessarily, though without taking the control of the money; that rule is now altered; whether the alteration is wholesome may be a question. It may be laid down now, as in *Brice v. Stokes*, that though one executor has joined in a receipt, yet whether he is liable shall depend on his acting. The former was a simple rule, that joining shall be considered as acting; but in the cases *since the rule, that joining alone does not impose responsibility, scarcely two judges agree." (i¹)

Stat. 22 &
23 Vict. c.
35, s. 31.

The non-liability of the executor appears to be now fully settled by the stat. 22 & 23 Vict. c. 35, s. 31 (*ante*, 1828).

Although it is true as a general rule that concurrence in the act of *devastavit* on the part of the parties injured by it, or acquiescence without original concurrence, will release the executors, (k) yet the court must inquire into all the circumstances which induced concurrence or acquiescence, and ascertain whether their conduct really amounts to such a previous sanction or subsequent ratification as ought to relieve the executors from responsibility. (l)

When a
devastavit
is released
by concu-
rence or
acquies-
cence.

It may be observed, in concluding this subject, that in *Churchill*

(i¹) [See *Stewart v. Conner*, 9 Ala. 803; *Brown's Appeal*, 1 Dallas, 311; *Sterrett's Appeal*, 2 Penn. St. 420, 421; *Vernon v. Henry*, 6 Watts, 192; *M'Nair's Appeal*, 4 Rawle, 148; *Stell's Appeal*, 10 Penn. St. 152; *Ochiltree v. Wright*, 1 Dev. & Bat. Eq. 336. It was held in *Monell v. Monell*, 5 John. Ch. 283, that if two executors or other trustees join in a receipt for money, it is *prima facie*, though not absolutely conclusive, evidence that the money came to the hands of both; that one executor may show, by satisfactory proof, that the joining in the receipt was necessary, or merely formal, and that the money in fact was paid to his companion; that without such satisfactory proof he must be liable to the party interested, and that if the money was in fact paid to his companion, yet if it was so paid by his act, direction, and agreement, and when he had it in his power to have controlled or secured the money, he is, and ought to be,

responsible. *Lewin Trusts* (5th Eng. ed.) 219 *et seq.*, 222, 223. The rules respecting co-executors are equally applicable to co-administrators. Lord Hardwicke once expressed an opinion that joint administrators resembled rather co-trustees, and that any one of them could not exercise the office without the concurrence of the rest; *Hudson v. Hudson*, 1 Atk. 460; but it was afterwards determined in the court of king's bench, that joint administrators and co-executors stood in this respect precisely on the same footing. *Willand v. Fenn*, cited *Jacomb v. Harwood*, 2 Ves. 267; *ante*, 1820; *Lewin Trusts* (5th Eng. ed.), 224; *Murray v. Blatchford*, 1 Wend. 583; *O'Neill v. Herbert*, 1 McMullan Eq. 495.]

(k) *Griffiths v. Porter*, 25 Beav. 236.

(l) *Walker v. Symonds*, 3 Swanst. 1; *Burrows v. Walls*, 5 De G., M. & G. 233, 251; *Davies v. Hodgson*, 25 Beav. 177.

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v. Hobson, (*m*) Lord Harcourt took a distinction between creditors and legatees. (*n*) But Lord Thurlow, in *Sadler v. Hobbs*, (*o*) said that this seemed to him an odd distinction, that a creditor should have a right to charge an executor and a legatee not. It should seem, however, that there may be cases where the strictness of law would charge a man as executor as to creditors, in which a court of equity would not charge him as to legatees. For example, legatees are bound by the terms of the will, but creditors are not so; and therefore, in many instances executors would be discharged as against legatees, though not as against creditors. (*p*)

Distinction as to executors' liability between creditors and legatees.

It remains to consider the doctrine of *devastavit*, as applied to the case of a married woman, executrix or administratrix. If a *feme sole*, being an executrix or administratrix, wastes the goods of her testator or intestate and then marries, her husband is liable, as long as the coverture lasts, for the **devastavit*. (*q*) But upon her death his liability ceases. And such being the principle of law, courts of equity have held that they could not establish any rule upon the difference whether the husband had or had not received a portion with his wife. (*r*)

Liability of husband and *feme covert* executrix for *devastavits*: before marriage:

It must, however, be observed, that if the wife was entitled to any *choses in action*, which the husband did not reduce into possession in her lifetime, so that it becomes necessary for him to take out administration to her, he will be liable, as her administrator, for her *devastavit*, by virtue of the statute 30 Car. 2. (*s*)

With respect to the *devastavit* of the wife committed during the coverture, the husband is liable in law and in equity, as long as both parties are alive, for the acts of his wife as executrix or administratrix, (*s*¹) for, as she has no power to

during coverture:

(*m*) 1 P. Wms. 242.

(*n*) See the remark of Lord Northington on this distinction. *Haden v. Parsons*, 1 Eden, 148.

(*o*) 2 Bro. C. C. 117.

(*p*) *Doyle v. Blake*, 2 Sch. & Lef. 239, 240; [Lewin Trusts (5th Eng. ed.), 222; Verner's Estate, 6 Watts, 250; Brown's case, 1 Dallas, 311; *ante*, 1802, and note (*m*¹), 1809; McNair's Appeal, 4 Rawle, 148.]

(*q*) *Kings v. Hilton*, Cro. Car. 603;

Heyward's case, Moore, 761; *Lumley v. Hutton*, 1 Roll. Rep. 268, 269; *Bachelor v. Bean*, 2 Vern. 60; Com. Dig. Baron & Feme, N.; *Palmer v. Wakefield*, 3 Beav. 227.

(*r*) 1 Sch. & Lef. 263.

(*s*) See *ante*, 1729.

(*s*¹) [As to the right and liability of married women to sue and be sued, as if sole, both in actions of contract and tort, in some of the American States, see 1 Chitty Pl. (16th Am. ed.) 32, notes (*v*¹)

act alone, his assent will be presumed. (*t*) And it has been holden that the husband, though living separate from his wife, shall be charged with her *devastavit*. (*u*) So if an executrix and her husband admit assets in answer to a bill filed against them, the assets become a debt of the husband in respect of this admission, and may be proved under a commission of bankruptcy issued against him. (*x*) If the assets are wasted during the coverture, either by the husband or wife, a creditor or legatee of the testator may, it should seem, sue the wife as well as the husband, and if she predeceases him her estate is answerable. (*y*)

Upon the death of the wife, the general rule is, that the liability of the husband (except as her administrator) for his wife's *devastavit*, committed as well during coverture as * before, ceases. (*z*) And therefore no proceeding can be had, either by action of debt on a *devastavit*, or by a *scire fieri* inquiry, against the husband of an executrix, if she dies after judgment had against her and her husband *de bonis testatoris*. Yet if a general judgment be had against husband and wife executrix, either upon the *scire fieri* inquiry, or in the action of debt, and afterwards the wife dies, the husband shall be charged. (*a*)

But in equity the surviving husband is liable for whatever husband's assets came to the hands of his wife, or his own hands, liability after coverture for assets come to his hands: during the coverture; upon the principle that all persons coming into possession of property bound by a trust are chargeable in equity as trustees. The cases establishing this head of equity are collected and commented upon by Lord Redesdale in his elaborate judgment in *Adair v. Shaw*, (*b*) in which case his lordship held that where a *feme covert* obtains administration and the goods are wasted during coverture, and the husband dies, his assets are chargeable in equity for the waste committed during coverture.

and (*z*), 82, note (*g*), 83, notes (*p*) and (*q*).]

(*t*) 1 Sch. & Lef. 266. [See *ante*, 232, note (*c*).]

(*u*) *Paget v. Read*, 1 Vern. 143.

(*x*) *Ex parte M'Williams*, 1 Sch. & Lef. 173.

(*y*) *Kingham v. Lee*, 15 Sim. 401, by Shadwell V. C. See *post*, 1840, note (*g*).

(*z*) 1 Sch. & Lef. 261.

(*a*) *Mounson v. Bourn*, Cro. Car. 519; *Baron v. Berkley*, 1 Lutw. 670; 1 Saund. 219 *d*, note to *Wheatley v. Lane*. Likewise, if the goods of the testator remain *in specie* in the hands of the husband, the party entitled to them may, after the death of the wife, bring an action of trover or detinue against the husband to recover them. 1 Sch. & Lef. 262.

(*b*) 1 Sch. & Lef. 243.

Accordingly, in *Clough v. Bond*, (c) on the death of an intestate, administration to her estate was granted to her son and daughter. The daughter being then under coverture, the assets were, in May, 1831, paid into a banking-house to the joint account of her husband and her brother, the administrator, and the whole of the fund, with the exception of the share of one of the next of kin, who was abroad, was soon afterwards paid away among the several parties entitled, by means of checks signed by the two persons in whose names the account stood. The husband of the administratrix died in December, 1831, and, ten * months afterwards, her brother and co-administrator drew out the balance, and, having applied it to his own use, absconded. And it was holden by Sir. L. Shadwell V. C. and afterwards, on appeal, by Lord Cottenham, that the estate of the husband of the administratrix was amenable for the loss. In this case the deposit was held to have been an improper one, and to have amounted to a *devastavit*, of which the husband was the author; inasmuch as by depositing the money in his own name and that of the co-administrator, he excluded his wife, the administratrix, from possessing the control over the co-administrator which she would and ought to have possessed in the event, which happened, of the husband's death before the wife, and gave the co-administrator the absolute power over the fund, and enabled him to appropriate it to himself without the control of his co-administratrix. So, in *Smith v. Smith*, (d) Romilly M. R. said it was now settled law that a husband is liable for all the assets received or *devastavits* committed, either by himself or by his wife during the coverture, in respect of an estate of which his wife was legal personal representative, and that in this respect the husband is liable at law during his life and his estate after his death. (e)

However, although the husband of an administratrix may have become liable to make good, to the next of kin of the intestate, the assets received by himself or his wife during the coverture, yet if the husband, at his death, makes his wife his executrix, and she possesses assets more than sufficient to answer the demands of the next of kin, after paying the other debts, the estate of the

(c) 3 My. & Cr. 499; S. C. *nomine* Giff. 382. As to the liability of the husband of a woman in whom a lease for years has vested as administratrix, see

(d) 21 Beav. 385, 387.

(e) See, also, *Charlton v. Coombes*, 4 Kearsley v. Oxley, 2 H. & C. 896.

husband is discharged, and therefore the next of kin cannot sue an administrator *cum testamento annexo* of the husband. (f)

* Another branch of this subject may now be considered, viz, liability of the responsibility of the married executrix, after the death of her husband, for a *devastavit* committed during the coverture. The rule is, according to the judgment of Lord Redesdale in *Adair v. Shaw*, that though the waste during the coverture be the act of the husband, yet it is an act for which the wife, after the determination of the coverture, is responsible to creditors at law, and, as it should seem, to legatees in equity. (g)

A distinction, indeed, has been taken between cases where the wife is executrix or administratrix *before* the marriage, and those where she became so *afterwards*. In the first case, if she survive her husband, she will be liable to answer, not only for her own wrongful acts in the administration previously to the coverture, but even for those of her husband * during the continuance of the marriage; because her title as executrix or administratrix having commenced and become complete before the marriage, it was her own folly to take a husband who would so misconduct himself as to waste her testator's or intestate's assets. But in the second

(f) *Tyler v. Bell*, 2 My. & Cr. 89. This case only shows that a repayment by the executor of the husband will discharge his estate. 21 Beav. 389, by Romilly M. R. But where the husband of an executrix made his wife and two others his executrix and executors, and the bill alleged that the husband died possessed of large personal estate, and his wife and the executors possessed themselves of all his personal estate, it was held that the liability of the husband for a *devastavit* in the wife's lifetime was not satisfied by the circumstance of his widow uniting in herself the two characters. *Smith v. Smith*, 21 Beav. 385.

(g) 1 Sch. & Lef. 258; 1 Rop. Husb. & Wife, 198, 2d ed. However, in *Clough v. Dixon*, 8 Sim. 598, *ante*, 1838, Sir L. Shadwell V. C. said that he had considerable doubt whether, where the plaintiff claimed as one of the next of kin of the intestate, the court could make the widow

responsible for the *devastavit* which was the act of her husband. And his honor added, that he did not think the reasoning of Lord Redesdale was satisfactory, where he said that a married woman, an executrix, would be responsible to the creditors of the testator, after the coverture, for a *devastavit* committed by the husband during the coverture. However, Lord Redesdale's statement of the law was, after much consideration, deliberately upheld by the lords justices (K. Bruce and Turner) in the recent cases of *Soady v. Turnbull*, L. R. 1 Eq. App. Ch. 494. And their lordships accordingly reversed the decree of Stuart V. C. who had held, that where during coverture probate was granted to a *feme* executrix, and the husband died insolvent, leaving the wife surviving, who died leaving assets, the wife's assets were not liable to make good the joint receipts of herself and her husband during coverture. 34 L. J. N. S. Ch. 539.

[1840] [1841] .

case, it is said the act of the husband, in obtaining probate or letters of administration in his wife's name, if against or without her consent, and she does not afterwards intermeddle in the administration, is an act from which she may dissent after his death, by renunciation, and avoid the consequences of his misconduct. (*h*) If, however, the husband procure probate or letters of administration in his wife's name and *with her consent*, then it seems that she surviving him will be personally answerable, upon the insolvency of his estate, for the waste committed by him of her testator's or intestate's assets; because she by her own act and assent having assumed the office of executrix or administratrix, and being the only legal personal representative of the testator or intestate (which distinguishes this case from that before mentioned, of the husband's discharge by her death from her *devastavit*, he being neither executor nor administrator), became liable with her husband for every act relating to it; and an action or suit lay against both of them, and upon his death the right of action survived against her. (*i*)

On the subject of the accounts of an executor or administrator, there has already been occasion to state, that he must account for all profits which have accrued in his own time, either spontaneously or by his acts, out of the estate of the deceased. (*k*) Therefore, if an executor has a lease for years which yields profits to the value of 20*l.* a year, rendering rent of 10*l.* a year, he shall account for 10*l.* a

Executors' accounts:

they shall account for all profits:

(*h*) 1 Rop. Husb. & Wife, 196, 2d ed. See *ante*, 234.

(*i*) 1 Rop. Husb. & Wife, 197, 3d ed.

(*k*) *Ante*, 1657; [*ante*, 974, note (*a*¹); *post*, 1966, note (*l*), 2057 to 2060, and note (*z*); *Watson v. Whitten*, 3 Rich. (S. Car.) 224. It is a fundamental principle in regard to trust estates, that the trustee shall derive to himself no gain, benefit, or advantage, by the use of the trust funds. Whatever of profit may be made shall belong to and become part and parcel of the trust estate. *McKnight v. Walsh*, 24 N. J. Eq. 498, 509; *Norris's Appeal*, 71 Penn. St. 106.] So he must account for all profits derived from his *office* as executor, as where he abandons it in favor of another for a valuable consideration. Sug-

den v. Crossland, 3 Sm. & G. 192. [The probate court may require an executor to pay a debt of his testator's estate in the kind of money which he has received as the property of the estate. *Magraw v. McGlynn*, 26 Cal. 420. If an administrator pays off the debts of his intestate at a discount, he is entitled to a credit only for the sum paid. *Miller v. Towles*, 4 J. J. Marsh. 255; *Heager's Executors*, 15 John. 65; *Carruthers v. Corbin*, 38 Geo. 75; *Paff v. Kinney*, 1 Bradf. Sur. 1. So a person, who, in view of taking the administration of an estate, purchases claims against the estate at a discount, is entitled to credit only for the sum actually paid. *Chevallier v. Wilson*, 1 Texas, 161.]

year as assets. (l) So if the executor carries on the trade or business * of the testator, whether in pursuance of a provision in articles of partnership entered into by the deceased, or by direction of the testator contained in his will, or under the direction of the court of chancery, the profits must be accounted for as assets. (m) Accordingly, in *Cook v. Collingbridge*, (n) a sale of a testator's share in a partnership trade, and the property belonging to it, made by his executors to his partners, for the purpose of being resold to one of his executors, was set aside, and his estate held entitled to his *aliquot* proportion of the subsequent profits as if the partnership had continued. (o) And it is a general rule, that an executor cannot be allowed, either immediately or by means of a trustee, to be a purchaser of himself of * any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased. (p) So if an

(l) Godolph. pt. 2, c. 24, s. 1; Com. Dig. Assets, C.

(m) *Ante*, 1658, 1791, *Palmer v. Mitchell*, 2 My. & K. 672; *Willet v. Blanford*, 1 Hare, 253. *Secus*, where the surviving parties admit the executor into the firm in his individual character, and the business is carried on without employing, in any way, any part of the assets of the testator. *Simpson v. Chapman*, 4 De G., M. & G. 154. Where the executors employ the assets in carrying on the trade for their own benefit, the legatees are entitled at their option to interest at 5 per cent. on the amount of assets employed, or the profits actually made. *Wedderburn v. Wedderburn*, 22 Beav. 100, *post*, 1846. And the executor may be made to account for and pay over the profits, although the persons in partnership with whom he had made those profits are not made parties to the suit. So in the case of surviving partners who are the executors of the deceased partner, and who continued the trade after his death, employing his assets, they must account for the profits made by such employment; 22 Beav. 100; *Townend v. Townend*, 1 Giff. 201; and it made no difference that they have taken a security for it in the form of a mortgage of the real

and personal property belonging to the partnership. 1 Giff. 201.

(n) *Jacob*. 607. See 27 Beav. 456, note.

(o) "One of the most firmly established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves, that the court will not inquire whether it has been done or not, but at once says that such a transaction cannot stand." By Lord Eldon, *Jacob*. 621. See acc. *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 My. & Cr. 11; *Willet v. Blanford*, 1 Hare, 253. See, also, *Portlock v. Gardner*, 1 Hare, 594, 603. [If an executor or administrator receives from a debtor an allowance over and above the amount of the demand, for extra trouble in the settlement of it, or if he should exact and receive extra interest, it has been held that he could not be charged with either in his administration account. *Gordon v. West*, 8 N. H. 444, 456, 457.]

(p) *Hall v. Hallett*, 1 Cox, 134; *Watson v. Toone*, Madd. & Geld. 153; *Smedley v. Varley*, 23 Beav. 358; [*ante*, 650, note (d¹), 938, and note (h); *Chapman v.*

executor compounds debts or mortgages, and buys them in for less than is due upon them, he shall not take the benefit of it himself, but other creditors and legatees shall have the advantage of it; and for want of them the benefit shall go to the party who is entitled to the surplus. (*q*) So in a case where the executor of a mortgagee for a term of years purchased the equity of redemption in fee for a small sum in his own name, and for his own benefit, it was held that he was a trustee of the fee for the benefit of the testator's estate. (*r*)

Again, if an executor lays out the assets on private securities, although he shall answer for all deficiencies which may be caused thereby, (*s*) he must account to the estate for all the benefit. (*t*) Indeed, the principle is general, that an executor, if he will take upon himself to act with regard to the testator's property in any other manner than his trust requires, puts himself in this situa-

Comings, 43 Vt. 16; Beeson v. Beeson, 9 Penn. St. 279; Hall's Appeal, 40 Penn. St. 409; Miller's Appeal, 30 Penn. St. 478, 493; Griswold v. Chandler, 5 N. H. 492, 498; Clark v. Blackington, 110 Mass. 369, 376; Patton v. Thompson, 2 Jones Eq. 285; Verner's Estate, 6 Watts, 250; Andrews v. Hobson, 23 Ala. 219; Charles v. Dubois, 29 Ala. 367; Wiswall v. Stewart, 32 Ala. 433; Litchfield v. Cudworth, 15 Pick. 23; Robinett's Appeal, 36 Penn. St. 191; Bellamy v. Bellamy, 6 Florida, 62; Mason v. Martin, 4 Md. 124; Spindler v. Atkinson, 3 Md. 409; Oliver v. Piatt, 3 How. 333; Schoonmaker v. Van Wyke, 31 Barb. 457; Davone v. Fanning, 2 John. Ch. 252; Hendricks v. Robinson, 2 John. Ch. 283; Evertson v. Tappen, 5 John. Ch. 497; Iddings v. Bruen, 4 Sandf. Ch. 222; Smith v. Lansing, 22 N. Y. 530; Ames v. Downing, 1 Bradf. Sur. 321; Yeackel v. Litchfield, 13 Allen, 417; 2 Sugden V. & P. (8th Am. ed.) 688, note (*m*¹); Johnson v. Kay, 8 Humph. 142; Green v. Sargeant, 23 Vt. 466; Mead v. Byington, 10 Vt. 116; Norris's Appeal, 71 Penn. St. 106, 125. An administrator, with an interest, may purchase at a sale of the intestate's estate; and if he uses the assets of the estate in making such purchase, the distributees may elect to consider the appropriation a conversion,

or may treat the administrator as a trustee. Julian v. Reynolds, 8 Ala. 680. It was held in Petrie v. Clark, 11 Serg. & R. 377, that equity will follow the assets of the estate into the hands of any one who is not a purchaser for valuable consideration, or although he is a purchaser for such value, if guilty of fraud and collusion with the executor or administrator. See Rogers v. Fort, 19 Geo. 94; Miller v. Williamson, 5 Md. 219; Boogen v. Hodges, 45 Miss. 78; Cooley v. Brown, 30 Iowa, 470.]

(*q*) Anon. 1 Salk. 155; Ex parte James, 8 Ves. 346; [*ante*, 1841, note (*k*); Calvert v. Holland, 9 B. Mon. 458.] Where an executor contracted with legatees for the purchase of their legacies, which were accordingly assigned to a trustee for him, in consideration of sums of money less in amount than the legacies, it was admitted that the transaction could not be sustained for the benefit of the executor; and it was also held that the deed of assignment did not operate as a release of the estate, and could not be upheld, as against the legatees who executed it, for the benefit of their co-legatees. Barton v. Hassard, 3 Dr. & W. 461.

(*r*) Fosbrook v. Balguy, 1 My. & K. 226; 3 Sugd. V. & P. 271, 10th ed.

(*s*) See *ante*, 1808, 1809.

(*t*) Adye v. Feuilletan, 1 Cox, 24.

tion, that if there be any loss he must replace it; but he cannot possibly be a gainer by it; any gain must be for the benefit of his *cestui que trust*. (u)

This may be the proper place to inquire, under what *circumstances executors or administrators shall be charged with interest on the assets retained in their hands. There are two grounds on which an executor or administrator may be charged with interest: 1st. That he has been guilty of negligence in omitting to lay out the money for the benefit of the estate. 2d. That he himself had made use of the money, or has committed some other *misfeasance*, to his own profit and advantage. (x)

1st. With respect to neglect on the part of the executor in not laying out balances, it must be observed, that it frequently may be necessary and justifiable for an executor to keep large sums in his hands to answer the exigency of the testator's affairs, (y) especially in the course of the first year after the decease of the testator; in which case such necessity is so fully acknowledged, that according to the ordinary course of the court, the fund is not considered distributable until after that time. (z) But if the court observes that an executor keeps money dead in his hands without any apparent reason or necessity, then it becomes negligence, and a breach of trust, and the court will charge the executor with interest. (a) And it seems that outstanding demands, even on

(u) *Piety v. Stace*, 4 Ves. 622; *Crosskill v. Bower*, 32 Beav. 86; [Norris's Appeal, 71 Penn. St. 106, 125.]

(x) *Rocke v. Hart*, 11 Ves. 59, 60; *Tebbs v. Carpenter*, 1 Madd. 306, 307; *Kildare v. Hopson*, 4 Bro. P. C. 550, Toml. ed.; *Lincoln v. Allen*, 4 Bro. P. C. 553, Toml. ed.; *Ashburnham v. Thompson*, 13 Ves. 401.

(y) See *Dawson v. Massey*, 1 Ball. & Beat. 231.

(z) *Forbes v. Ross*, 2 Cox, 115, 116, by Lord Thurlow; [Lewin Trusts (5th Eng. ed.), 279.]

(a) *Littlehales v. Gascoyne*, 3 Bro. C. C. 73; *Brown v. Southouse*, 3 Bro. C. C. 108; *Franklin v. Frith*, 3 Bro. C. C. 433; *Hall v. Hallett*, 1 Cox, 134; *Seers v. Hind*, 1 Ves. jr. 294; *Longmore v. Broom*, 7 Ves. 124; *Ashburnham v.*

Thompson, 13 Ves. 401; *Turner v. Turner*, 1 Jac. & W. 39; *Goodchild v. Fenton*, 4 Y. & Jerv. 481; *Stafford v. Fiddon*, 23 Beav. 386; *Johnson v. Prendergast*, 28 Beav. 480; [Brandon v. Hoggatt, 32 Miss. 335, 340; *Lomax v. Pendleton*, 3 Call, 538; *Handly v. Snodgrass*, 9 Leigh, 484; *Darrel v. Eden*, 3 Desaus. 261; *Dunscomb v. Dunscomb*, 1 John. Ch. 508; *Scheffelin v. Stewart*, 1 John. Ch. 620; *Garniss v. Gardiner*, 1 Edw. Ch. 128; *Williamson v. Williamson*, 6 Paige, 298; *Chase v. Lockerman*, 11 Gill & J. 185; *Armstrong v. Miller*, 6 Ham. 118; *Aston's Estate*, 5 Whart. 228; *Lund v. Lund*, 41 N. H. 359; *Duncan v. Dent*, 5 Rich. Eq. 7, 11; *English v. Harvey*, 2 Rawle, 305; *Merrick's Estate*, 2 Ashm. 357; *M'Call's Estate*, 1 Ashm. 305; *Billington's Appeal*, 3 Rawle, 48; *Clarke's*

probable grounds, are no reason * why the executors should not lay the testator's money out. (b) But an executor shall not be

Appeal, 2 Watts, 405 ; *Ogilvie v. Ogilvie*, 1 Bradf. Sur. 356 ; *Hasler v. Hasler*, 1 Bradf. Sur. 248. The rule for charging executors and administrators with interest, in Massachusetts, was stated by Parker C. J. in *Wyman v. Hubbard*, 13 Mass. 232, 233. "The general rule," he says, "has been, not to charge executors with interest when their accounts are settled in ordinary course : and the reason is, that they are not at liberty to risk the money belonging to the estate which they represent ; and are to be always ready to pay it over, according to the directions of the will or the decree of the probate court. They ought not to be presumed to have made profitable use of it ; because it would be contrary to their duty to use it at all. This rule admits of an exception ; when it shall appear that the executors have actually made use of the money ; and this fact may be proved by direct testimony, or may be inferred from a long delay in settling their accounts, or in paying over balances in their hands after they have been demanded, and perhaps from other circumstances." *Stearns v. Brown*, 1 Pick. 530, 531, 532 ; *Morton J. in Boynton v. Dyer*, 18 Pick. 1, 7 ; *Williams v. American Bank*, 4 Met. 317, 324. The rule is more concisely stated by Mr. Justice Wilde in *Stearns v. Brown*, 1 Pick. 531. "The general principle is," he says, "that administrators are not chargeable with interest, for money remaining in their hands, unless they loan it and receive interest, or make some profitable use of it, or unreasonably detain it." The same rule has been adopted in

Maine. *Knight v. Loomis*, 30 Maine, 204, 209, 210. And in New Hampshire, in *Griswold v. Chandler*, 5 N. H. 497, *Richardson C. J.* said : "The true rule is, that in all cases, where the administrator, without any just reason or excuse, retains the money in his own hands unemployed, when it ought to be paid over ; in all cases where he receives interest for money which belongs to the estate ; and in all cases where he applies money belonging to the estate to his own use ; he ought to be charged with interest. It is believed that an administrator is never charged with interest except in these cases." The same rule is stated and applied in subsequent cases. *Gilchrist C. J.* in *Mathes v. Bennett*, 21 N. H. 199 ; *Wendell v. French*, 19 N. H. 213 ; *Sargent J.* in *Lund v. Lund*, 41 N. H. 359. See, also, to the same effect, *The State v. Mayhew*, 4 Halst. 70, 77 ; *Voorhees v. Stoothoff*, 6 Halst. 145 ; *Lake v. Park*, 4 Harrison, 199 ; *Darrel v. Eden*, 3 Desaus. 241 ; *Turney v. Williams*, 173, 213 ; *Norris's Appeal*, 71 Penn. St. 106 ; *Dexter v. Arnold*, 3 Mason, 290. In New York it is held to be the duty of an executor or administrator, as well as that of a special administrator, to deposit the funds of the estate in a solvent bank, or other institution that receives money on deposit, subject to demand ; and he may receive interest thereon from the depository. But he has no right to deposit in his individual name ; nor to loan the funds on time ; nor to continue a deposit for an unreasonable length of time. *Baskin v. Baskin*, 4 Lansing, 90. As to interest, it is not ordinarily chargeable

(b) 3 Bro. C. C. 434 ; 1 Madd. 305. It was resolved by Sir Joseph Jekyll, in *Taylor v. Gerst*, Mosely, 99, that if money placed out at interest be called in by the executor without any cause, he shall pay interest for it. But in *Newton v. Bennet*, 1 Bro. C. C. 361, Lord Thurlow said that

an executor had an honest discretion to call in a debt bearing interest, if he thought the same in hazard. It should seem that he ought to lay it out again immediately in the three per cents. or other authorized security.

charged with interest for a balance in his hands, retained under a fair apprehension of his right to it. (c)

against an executor or administrator for the period of a year after the issuing of his letters, especially if the funds of the estate have been kept separate and not mixed with his own. But at all times, if he has employed the funds, he will be charged with interest on the ground of the use of the assets for his own benefit. Even where he is justified in retaining the assets, if they have been employed by him to his own advantage, he is chargeable with interest on the ground that he cannot be allowed to make profit out of the estate. *Ogilvie v. Ogilvie*, 1 Bradf. Sur. 356. In *Jacot v. Emmett*, 11 Paige, 145, the chancellor said that, if the administrator has mixed the money belonging to the estate of his intestate with his own, and has used it, so that he has it not on hand when he is called on for payment, he may unquestionably be charged with interest, according to the settled rule of the court in such cases. "But a mere neglect by an administrator to invest moneys which he may be called upon to pay over to the distributees at any moment, would be no ground for charging him with interest, if the money was kept in bank or otherwise, ready to be paid over when called for. Indeed, the administrator would not be authorized to loan the fund, to which adult distributees were immediately entitled, at their risk, and without authority from them." *Burtis v. Dodge*, 1 Barb. Ch. 77. Should no unreasonable

delay occur, and the executor or administrator has not applied the funds to his own use, he will not be charged with interest. *Minuse v. Cox*, 5 John. Ch. 441, 448. But where an administrator had the funds of the estate in cash for six years, and did not show that the money was kept in bank or otherwise ready to be paid over when called for, and did not explain the delay in closing the estate, he was held chargeable with interest, on the presumption that he had used the funds. *Hasler v. Hasler*, 1 Bradf. Sur. 248. The general practice appears to be, not to hold executors and administrators, *prima facie*, chargeable with interest during the time the law allows them for getting in the estate and settling their accounts, which is most commonly one year after administration is taken out; see *Fox v. Wilcocks*, 1 Binn. 194; *Brandon v. Hoggatt*, 32 Miss. 335, 340; but they will still be charged, if it be proved that they have received interest or have used the money during that time — those facts rendering every depository of money liable for interest. *Verner's Estate*, 6 Watts, 250. See *Findley v. Smith*, 7 Serg. & R. 264, 268; *Commonwealth v. Mateer*, 16 Serg. & R. 416, 421; *Fox v. Wilcocks*, 1 Binn. 194; *Walthour v. Walthour*, 2 Grant. Cas. 102; *Bitzer v. Hahn*, 14 Serg. & R. 232. After that period, they are liable *prima facie*, after a reasonable time, which is

(c) *Bruere v. Pemberton*, 12 Ves. 386; [*Wright v. Grovier*, 25 Mich. 428.] So as to money paid away under a mistake as to the legal right to it. *Saltmarsh v. Barrett*, 31 Beav. 349. An administrator *pendente lite* is not liable to pay interest upon a balance in his hands, during the pendency of the suit in the ecclesiastical court. *Gallivan v. Evans*, 1 Ball & Beat. 191. [An executor or administrator is liable to pay interest, if he improperly neglects to settle his account for a long

period; *Lyles v. Hatton*, 6 Gill & J. 122; *Turney v. Williams*, 7 Yerger, 172; or to distribute when he ought; *Gray v. Thompson*, 1 John. Ch. 82; *Griswold v. Chandler*, 5 N. H. 497; *Smithers v. Hooper*, 23 Md. 273; *Wright v. Grovier*, 25 Mich. 428; but not if those interested in the estate of the deceased have been equally guilty of laches in protracting the settlement. *Forward v. Forward*, 6 Allen, 494.]

As to the rate of interest which the executor shall pay, the rule appears to be, that in these cases, where negligence alone is imputable to him, he shall be charged only with ^{rate of interest:}

generally six months, for interest on all money which has come to their hands, or at least on the annual balance in their hands; *Merrick's Estate*, 1 Ashm. 305; *Boynton v. Dyer*, 18 Pick. 2, 8; *Gilman v. Gilman*, 2 Lansing, 1; and can discharge himself only by showing that he appropriated it duly to the purposes of the estate; or, if he retained the money, that he retained it idle in his hands, according to his duty, and *bonâ fide*, to await the event of suits brought, or likely to be brought against the estate; *Lamb v. Lamb*, 11 Pick. 371, 374, 375; *Wilson v. Wilson*, 3 Gill & J. 20, 24; *Pace v. Burton*, 1 McCord Ch. 247; *Lafont v. Ricaud*, 1 Bailey Eq. 487; *Arndt v. Linney*, 1 Dev. Eq. 369; *Grattan v. Appleton*, 3 Story, 755, 766; *Burtis v. Dodge*, 1 Barb. Ch. 78, 90; *Dortch v. Dortch*, 71 N. Car. 224; or can show as against a distributee or legatee, that no demand was made and refunding bond tendered (where that is required before suit brought to give a right of action), and in case of a minor, no guardian appointed; and also that he has not used the money; *Patterson v. Nichol*, 6 Watts, 379, 382; *Handy v. The State*, 7 Harr. & J. 43, 46; *Thompson v. Sanders*, 6 J. J. Marsh. 94, 99; *Overstreet v. Potts*, 4 Dana, 138; *Cavendish v. Fleming*, 3 Munf. 198, 201; *Sparhawk v. Buell*, 9 Vt. 42, 82; but see *Flintham's Appeal*, 11 Serg. & R. 16; *Bourne v. Meehan*, 1 Grattan, 292; *Hallett v. Allen*, 13 Ala. 555, 558; and if any of these can be shown, he is not liable. In short, the liability of executors and administrators to be charged with interest, depends upon their performing or neglecting their duties, under the circumstances of the particular case. *Slade v. Slade*, 10 Vt. 192, 195; *Wood v. Garnett*, 6 Leigh, 271; *Chase v. Lockerman*, 11 Gill & J. 186, 208; *Bitzer v. Hahn*, 14 Serg. & R. 232, 239; *Brandon v. Hoggatt*, 32 Miss. 335, 340. They are liable to interest if they

neglect unreasonably, or refuse to account; for in that case, it will be presumed that they have used the money. *Moor v. Beauchamp*, 5 Dana, 70, 78; *Lyles v. Hatton*, 6 Gill & J. 122, 135; *Comegys v. The State*, 10 Gill & J. 176, 186. Interest with annual rests may be charged against an executor or administrator upon an amount improperly retained by him as commissions which are disallowed. *McKnight v. Walsh*, 24 N. J. Eq. 498; S. C. 23 N. J. Eq. 136. Where an executor or administrator is entitled to commissions, but chargeable with interest, the interest will be calculated on the balance after deducting the commissions, although the allowance of them may not be made until the settlement of the administration account. *Callaghan v. Hall*, 1 Serg. & R. 241. It has been held that an administrator is liable for interest, where by his wrongful acts he disappoints claimants, as by a mispayment. *Jones v. Ward*, 10 Yerger, 161, 163. And, generally, interest is to be charged on all sums received by an executor or administrator and not applied to the purposes of the estate. *M'Caw v. Blewit*, 1 Bailey Eq. 98, 102. But where executors and administrators are not in default, they are not chargeable with interest; accordingly, it has been held that they are not subject to interest on funds in their hands during the pendency of their accounts in the court, on exceptions or appeal, because it could not be paid over before final confirmation; *Hoopes v. Brinton*, 8 Watts, 73; *Wendell v. French*, 19 N. H. 205, 213; *Duncan v. Dent*, 5 Rich. Eq. 7; see *January v. Poyntz*, 2 B. Mon. 404; *Yundt's Appeal*, 13 Penn. St. 575, 581, 582; *Young v. Brush*, 38 Barb. 294; *Brandon v. Hoggatt*, 32 Miss. 335; *Flintham's Appeal*, 11 Serg. & R. 17; unless during the interval they make use of the money. *Stearns v. Brown*, 1 Pick. 530, 533. As a general rule, an executor or administrator, during the pendency of a

47. per cent., in respect of the balances, which he ought to have laid out, either in compliance with the express directions of the will, or from his general duty, where the will is silent on the sub-

suit for an account and distribution of the fund in his hands, should ask for leave to pay such fund into court, or for authority to invest it under the direction and sanction of the court, and if he invests it without the sanction of the court, on insufficient security, he will be charged with the amount thus invested, as a misapplication of so much of the fund. *Hosack v. Rogers*, 9 Paige, 461. But after final settlement, and an order for distribution, he becomes liable for interest without a demand. *Henny v. State*, 9 Miss. 778. Where an executor or administrator, after settling the estate, becomes, or acts as guardian, or the executor is, by the will, clothed with a trust to invest, they become liable as guardians or trustees to invest are; and are chargeable with interest, simple or compound, according to circumstances, if they do not invest. *Karr v. Karr*, 6 Dana, 3, 5; *Smith v. Lampton*, 8 Dana, 69, 73; *Adams v. Spalding*, 12 Conn. 350, 360; *Bitzer v. Hahn*, 14 Serg. & R. 232. As to the time from which interest is to be computed, in case of negligence on the part of executors and administrators in suffering money to lie idle, Chancellor Kent said in *Duncomb v. Duncomb*, 1 John. Ch. 511, "There does not appear to be any absolute rule, and the time must vary according to circumstances. It would be laying too heavy a hand upon executors, to charge interest from the moment money was received. In some cases, executors are allowed a year to look out for some due appropriation of the money, and in other cases it would be unreasonable. Here the executors show no pains or effort to discharge themselves of the money. I observe that six months was the time allowed, in a like case, by the civil law, to the tutor to invest the funds; and if the defendants are charged with interest after six months from the time they received it, it will not be unreasonable in this case." See Ring-

gold *v. Ringgold*, 1 H. & Gill, 11; *Merrick's Estate*, 2 Ashm. 485; *Worrell's Appeal*, 23 Penn. St. 44; *Voorhees v. Stoothoff*, 6 Halst. 155; *McKnight v. Walsh*, 24 N. J. Eq. 498, 509. In *Cogswell v. Cogswell*, 2 Edw. Ch. 231, a year from the testator's death was allowed to make an investment directed in the stock of the United States Bank; and, on the other hand, in *Barney v. Saunders*, 16 How. (U. S.) 544, three months appears to have been considered sufficient. The executor must, of course, have a reasonable time, under all the circumstances, to seek investments. *Dillard v. Tomlinson*, 1 Munf. 183; *Carter v. Cutting*, 5 Munf. 223; *Ringgold v. Ringgold*, 1 H. & Gill, 11.] In order to give a claim for interest, there must be a clear case of improper retention of balances to a considerable or substantial amount. *Jones v. Morrall*, 2 Sim. N. S. 241, 252. See, also, *Davenport v. Stafford*, 14 Beav. 319. [See *Estate of McQueen*, 44 Cal. 584. There may be circumstances where interest will only be allowed on accumulated balances; as where the annual balances are too small to have been put to interest; where the trustee receives no credit or profit from the act; or the act was accidental, or beneficial to the *cestui que trust*. *Rapalje v. Norsworthy*, 1 Sandf. Ch. 399; *Graves's Appeal*, 50 Penn. St. 189; *Bond v. Abbott*, 42 Ala. 499; *Woods v. Garnett*, 6 Leigh, 271; *Luken's Appeal*, 47 Penn. St. 356; *Fay v. Howe*, 1 Pick. 527; *Gilman v. Gilman*, 2 Lansing, 1. It has been held the proper mode of taking the account to treat funds received during the current year as unproductive until its close, and to regard all expenditures, including compensation and commissions of trustees, in the course of the year, as made before the balance struck; and then to strike a balance, on which, as a general rule, interest is to be allowed, but in such a way as to avoid compounding interest.

ject. (*d*) In order to induce the court to charge the executor with more than 4l. per cent. a special case is necessary. (*e*)

But 2dly. Where there has been a direct breach of trust, the executor may be charged with a higher rate of interest. With respect to employing assets to his own advantage, Lord Hardwicke, on two occasions, (*f*) expressed an opinion that an executor might do so without impropriety, and without being liable to any charge for interest. But this *doctrine has been entirely overruled by more modern cases. (*g*) And it is now established, that if the executor makes use of the money, he ought to pay the interest he made; (*h*) upon the principle just above considered, that he ought not to derive any profit from the trust property. (*i*) Hence, it has become a settled rule that if a trustee, having trust money in his hands, knowingly applies it to his own use, or in his trade, he shall be charged with interest at the rate of 5l. per cent. (*k*) If the fund is employed in trade, the *cestui que trusts* have a right to an option of taking either the interest or the profits which have

Pettus v. Clawson, 4 Rich. Eq. 92; *Clarkson v. De Peyster*, 2 Wend. 78; *Vanderheyden v. Vanderheyden*, 2 Paige, 288; *Luken's Appeal*, 47 Penn. St. 356; *Boyn-ton v. Dyer*, 18 Pick. 1; *Reynolds v. Walker*, 29 Miss. 250; *Roach v. Jelks*, 40 Miss. 754; *Crump v. Gerock*, 40 Miss. 765; *Rowland v. Best*, 2 McCord Ch. 317; *Jordan v. Hunt*, 2 Hill Eq. 145; *Walker v. Bynum*, 4 Desaus. 555; *Jones v. Ward*, 10 Yerger, 160; *Powell v. Powell*, 10 Ala. 900; *Burwell v. Anderson*, 3 Leigh, 348; *Garnett v. Carr*, 3 Leigh, 407; *Campbell v. Williams*, 3 Monr. 122. When the executor or other trustee pays the money into court, interest ceases, of course.] The executors may be charged with interest on balances, though not claimed by the bill. 1 Jac. & W. 39. See 2 Sim. N. S. 241.

(*d*) *Dornforth v. Dornforth*, 12 Ves. 130, note (29), 2d ed.; S. C. cited 1 Madd. 302; *Ashburnham v. Thompson*, 13 Ves. 401; *Rocke v. Hart*, 11 Ves. 58, 60, 61; *Tebbs v. Carpenter*, 1 Madd. 307; *Sutton v. Sharp*, 1 Russ. 151; *Melland v. Gray*, 2 Coll. 295; [*English v. Harvey*, 2 Rawle, 305.]

(*e*) 1 Madd. 306; *Mousley v. Carr*, 4

Beav. 49; *Hosking v. Nicholls*, 1 Y. & Coll. C. C. 478, 480.

(*f*) *Adams v. Gale*, 2 Atk. 106; *Child v. Gibson*, 2 Atk. 603.

(*g*) *Perkyns v. Baynton*, 1 Bro. C. C. 375; *Newton v. Bennet*, 1 Bro. C. C. 361; *Forbes v. Ross*, 2 Bro. C. C. 430; *Tebbs v. Carpenter*, 1 Madd. 304.

(*h*) *Forbes v. Ross*, 2 Cox, 116; *Rocke v. Hart*, 11 Ves. 60; [*Barney v. Saunders*, 16 How. (U. S.) 543; *Oswald's Appeal*, 3 Grant Cas. 300; *Martin v. Rayborn*, 42 Ala. 468.]

(*i*) *Ante*, 1841.

(*k*) *Mousley v. Carr*, 4 Beav. 49; [*Manning v. Manning*, 1 John. Ch. 527; *Schieffelin v. Stewart*, 1 John. Ch. 620, 625, 626; *Brown v. Ricketts*, 4 John. Ch. 303, 305; 2 Story Eq. Jur. § 1277; *Myers v. Myers*, 2 McCord, 214, 266; *Diffenderfer v. Winder*, 3 Gill & J. 311; *Blauvelt v. Ackerman*, 5 C. E. Green, 148, 149; *Staats v. Bergen*, 2 C. E. Green, 554, 562, 563; *Miller v. Beverleys*, 4 Hen. & Munf. 415; *Griswold v. Chandler*, 5 N. H. 497; *Lund v. Lund*, 41 N. H. 359; *Wendell v. French*, 19 N. H. 213; *Christie's Estate*, 1 Tuck. N. Y. Sur. 81.]

arisen from the trade ;(*l*) but they must elect to take either the profits for the whole period or the interest for the whole period. (*m*) If it be shown that the executor used the property in his trade, and the amount of the profits made by him does not appear, the court takes it for granted that he made 5*l.* per cent. at the least, and it is incumbent on him to show that he made less. (*n*) It has been further established, that if an executor or other trustee mixes trust funds with his private moneys, and employs them both in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed. (*o*) And it should seem to be now settled, that *an executor who, being a trader, and having, of course, an account with a banker, places the assets at his banker's in his own name, by that means increasing the balances in his favor, acquiring additional credit, and enjoying in his business the advantages naturally arising from that circumstance, must be considered as having employed the money for his own benefit, and must, therefore, be charged with interest at 5*l.* per cent. (*p*)

(*l*) *Burden v. Burden*, cited 1 Jac. & W. 134; *Wedderburn v. Wedderburn*, 22 Beav. 100; *ante*, 1841, note (*k*); [*Utica Ins. Co. v. Lynch*, 11 Paige, 524; *Billinglea v. Glenn*, 45 Ala. 540; *Matter of Holbert*, 39 Cal. 597; *Robinett's Appeal*, 36 Penn. St. 174; *Brown v. Ricketts*, 4 John. Ch. 303; *Wells J. in Marsh v. Renton*, 99 Mass. 135; *Lewin Trusts* (5th Eng. ed.) 276; *Barney v. Saunders*, 16 How. (U. S.) 543; *Norris's Appeal*, 71 Penn. St. 125; *Estate of Brown*, 8 Phil. (Penn.) 197; *Whitney v. Peddicord*, 63 Ill. 249; *Johnson v. Hedrick*, 33 Ind. 129; *Powell v. Cooper*, 42 Miss. 221.]

(*m*) *Heathcote v. Hulme*, 1 Jac. & W. 122.

(*n*) *Rocke v. Hart*, 11 Ves. 61; [*Bentley v. Shreve*, 2 Md. Ch. 219; *Rapalje v. Norsworthy*, 1 Sandf. Ch. 339.] It should seem that interest shall in no case be charged at less than 5*l.* per cent. when the fund has been embarked in trade without authority. 1 Jac. & W. 134, 135. See, also, *Robinson v. Robinson*, 1 De G., M. & G. 257, by Lord Cranworth.

(*o*) *Docker v. Somes*, 2 My. & K. 655; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 My. & Cr. 41; *Willett v. Blandford*, 1 Hare, 253; *Portlock v. Gardner*, 1 Hare, 594, 603; [*Norris's Appeal*, 71 Penn. St. 106, 125; *Ivey v. Coleman*, 42 Ala. 409; *McElroy v. Thompson*, 42 Ala. 656.]

(*p*) *Treves v. Townshend*, 1 Bro. C. C. 385; *Rocke v. Hart*, 11 Ves. 61; *Sutton v. Sharp*, 1 Russ. 151, 152; [*Lewin Trusts* (5th Eng. ed.), 276; *Mayor of Berwick-upon-Tweed v. Murray*, 7 De G., M. & G. 519; *Mumford v. Murray*, 6 John. Ch. 1; *Beverleys v. Miller*, 6 Munf. 99; *Diffenderffer v. Winder*, 3 Gill & J. 341; *Norris's Appeal*, 71 Penn. St. 106; *Garniss v. Gardiner*, 1 Edw. Ch. 128; *Jacot v. Emmett*, 11 Paige, 142; *Kellett v. Rathbun*, 4 Paige, 102; *De Peyster v. Clarkson*, 2 Wend. 77; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Peyton v. Smith*, 2 Dev. & Bat. Eq. 325; *Jameson v. Shelby*, 2 Humph. 198; *Dyott's Estate*, 2 Watts & S. 565; *Merrick's Estate*, 2 Ashm. 485; *In re Thorp, Davies*, 290; *Kerr v. Laird*, 27 Miss. 544;] S. P. although the will authorized the ex-

There are many other cases where executors, who have applied the assets in direct dereliction of their duty, have been charged with 5*l.* per cent. interest. Thus, in *Forbes v. Ross*, (*q*) there was an express trust, by a direction in the will, to lay out the fund in the purchase of lands, or upon heritable or personal securities, at such a rate of interest as the executors should think reasonable ; so that they were at liberty, using their discretion soundly and fairly and honestly, to lend it to anybody that they might suppose would give a reasonable interest for it, considering at the same time the degree of responsibility of the person to whom it was lent. They lent the fund to one of themselves, on bond of 4*l.* per cent. when 5*l.* per cent. might have been made by heritable or government securities. And it was held that he should be charged with 5*l.* per cent. interest. So, in *Piety v. Stace*, (*r*) the will directed the executor to place the money in the public funds, or upon mortgages, or other good securities, and to pay the dividends and interest to certain persons for life, and after their death to dispose of the capital in a certain mode. The executor called in part of the property * which was out on security, used it generally in his trade, and in various transactions in the public funds, paying only the dividends of the stock to the persons entitled under the will, and he lent part to his son. And Lord Alvanley directed an account of all the executor had made, with the interest at the rate of 5*l.* per cent. upon the balances in his hands. In *Pocock v. Reddington*, (*s*) the executor and trustee having been guilty of a breach of trust by selling out stock and dealing improperly with the money, Lord Alvanley held that the *cestui que trust* had an option to have the stock replaced or the money pro-

ecutor to invest the residue on "good private securities." *Westover v. Chapman*, 1 Coll. 177. See, also, *In re Hilliard*, 1 Ves. jr. 90 ; *Melland v. Gray*, 2 Coll. 295 ; *Williams v. Powell*, 15 Beav. 461. But see, *contra*, *Perkyns v. Baynton*, 1 Bro. C. C. 375 ; *Browne v. Southouse*, 3 Bro. C. C. 107. [In *Dunscomb v. Dunscomb*, 1 John. Ch. 510, Chancellor Kent says : "The rule is founded in justice and good policy ; it prevents abuse, and it indemnifies against negligence." See *Brown v. Ricketts*, 4 John. Ch. 303, 305. But there must be some element of a breach of trust in the transaction, or violation of

duty. *McKnight v. Walsh*, 23 N. J. Eq. 136 ; S. C. 24 N. J. Eq. 492 ; *Rapalje v. Norsworthy*, 1 Sandf. Ch. 399.] See *Burdick v. Garrick*, 5 L. R. Ch. App. 223, as to what is employment of money in business. [If the trustee is a member of a firm of bankers, and he deposits with the firm in his own name as trustee, he will not be charged with interest, although the firm made a profit on the deposit. *Hess's Estate*, 69 Penn. St. 454.]

(*q*) 2 Cox, 113 ; S. C. 2 Bro. C. C. 430.

(*r*) 4 Ves. 620.

(*s*) 5 Ves. 794.

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duced by the sales, with interest at 5*l.* per cent. or more, if more had been made by it, and the costs occasioned by the executor's misconduct. (*t*) In *Mosley v. Ward*, (*u*) an executor in trust for infants, unnecessarily calling in the property, out upon good security at 5*l.* per cent., except a small part, keeping large balances in his hands, and using it as his own, was ordered by Lord Eldon to be charged with interest at 5*l.* per cent. and costs. In *Bick v. Motley*, (*x*) the master found that two executors had, by signing joint checks, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate; and that the sums so received by them were debts provable under their respective commissions, both executors having become bankrupt. Sir C. Pepys M. R. said that as, in respect of such sums, the executors had each committed a *devastavit*, each was chargeable, according to the uniform practice of the court, with interest at 5*l.* per cent. upon the sums which he had enabled his co-executor to receive. And his honor accordingly made an order, that interest at that rate should be added to the principal sums to be proved against the bankrupts' estates respectively. (*y*) In *Jones v. Foxall*, (*z*) and **Williams v. Powell*, (*a*) Romilly M. R. stated the rule as established by the authorities, that if an executor has retained balances in his hands, which he ought to have invested, the court will charge him with simple interest at 4*l.* per cent. on the balances; but if in addition to such retention he has committed a direct breach of trust, or been guilty of misconduct, he will be charged after the rate of 5*l.* per cent. (*b*)

(*t*) See, also, *Bate v. Scales*, 12 Ves. 402.

(*u*) 11 Ves. 581.

(*x*) 2 My. & K. 312.

(*y*) See, also, *Munch v. Cockerell*, 9 Sim. 339, 351; confirmed as to charging the trustees with interest at 5*l.* per cent., by Lord Cottenham, 5 My. & Cr. 178, 220.

(*z*) 15 Beav. 388.

(*a*) 15 Beav. 461.

(*b*) See, also, the rule stated by the same judge in *Knott v. Cottee*, 16 Beav. 80; [*Voorhees v. Stoothoff*, 6 Halst. 145. The burden of proof is on the executor or trustee to show that he has made no profits, or received no benefit from the funds;

and if he refuses to account or to show the amount of profits received, the court will give compound interest, in order that it may be made certain that the *cestui que trust* gets the profits of the trade or business in which the executor or trustee has employed the money. *Swindall v. Swindall*, 8 Ired. Eq. 286; *Diffenderffer v. Winder*, 3 Gill & J. 311; *Bryant v. Craig*, 12 Ala. 354; *Karr v. Karr*, 6 Dana, 3; *Smith v. Kennard*, 38 Ala. 695; *Hugh v. Smith*, 2 Dana, 253; *McElhenny's Appeal*, 61 Penn. St. 188; *Ringgold v. Ringgold*, 1 H. & Gill, 11. But if it appears that the money was used in business, but that the profits were not equal to the interest, annual rests will be refused. *Kyle*

But in the latter case of *The Attorney General v. Alford*, (c) Lord Cranworth C. said he could not understand the principle on which the court can proceed *in pœnam* to punish the executor for his misconduct, by making him account for more interest than he has received. And his lordship stated his opinion to be, that the court ought, in the case of an executor who has money in his hands which he ought to invest and does not invest, to charge him only with the interest which he has received, or which the court is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive, that he is estopped from saying that he did not receive it. (c¹) And the learned judge added, that misconduct did not seem to him to warrant the conclusion that the executor did in point of fact receive, or is estopped from saying that he did not receive, the interest, or that he is to be charged with anything he did not receive, if it is not misconduct contributing to that particular result. And his lordship proceeded to hold (varying a decree of Stuart V. C.), (d) that an executor who for several years had retained funds in his hands uninvested, which he ought to have invested, was chargeable only with simple interest at 4l. per cent. there being no circumstance to lead to the conclusion that he had made any profit by his misconduct. (d¹) If, indeed, it had appeared that he had improperly used the money for his own purposes, the court would not inquire what had been the actual proceeds of his speculation,

v. Barnett, 17 Ala. 306; *Ringgold v. Ringgold*, 1 H. & Gill, 11; *Myers v. Myers*, 2 McCord Ch. 214; *Wright v. Wright*, 2 McCord Ch. 185; *Utica Ins. Co. v. Lynch*, 11 Paige, 521; *Johnson v. Miller*, 33 Miss. 553.]

(c) 4 De G., M. & G. 483, 851, 852; *Burdick v. Garrick*, L. R. 5 Ch. App. 233, 241.

(c¹) [Norris's Appeal, 71 Penn. St. 106, 125, 126.]

(d) 2 Sm. & G. 488.

(d¹) [See *Mayor of Berwick-upon-Tweed v. Murray*, 7 De G., M. & G. 497; *Lewin Trusts* (5th Eng. ed.), 276-280; *Hill Trustees* (3d Am. ed.), 547 *et seq.*, and notes and cases cited; *Blogg v. Johnson*, L. R. 4 Ch. App. 225, 228; *Turner v. Burkinshaw*, L. R. 2 Ch. App. 488; *Frey*

v. Frey, 2 C. E. Green, 72, 74; *Barney v. Saunders*, 16 How. (U. S). 542, 543; *Schieffelin v. Stewart*, 1 John. Ch. 620; *Burdick v. Garrick*, L. R. 5 Ch. App. 233. Where an executor who was, by the will, directed to reserve from the testator's personal estate, and invest money for the purpose of paying a legacy, did reserve, but did not invest, the money, it was held that the executor was chargeable with interest from the time, as shown by his account, when the legacy was taken from the personal estate, and that as he had detained instead of investing the money, annual rests were to be allowed. *Elliott v. Sparrell*, 114 Mass. 404. See *Boynton v. Dyer*, 18 Pick. 1; *Miller v. Congdon*, 14 Gray, 114.]

but would infer * he either did make 5*l.* per cent. or ought to be estopped from saying that he did not. (*e*)

As a general rule, the court decrees the computation of simple interest to be made. (*f*) But there are instances in which an executor has been charged with compound interest. Thus in *Raphael v. Boehm*, (*g*) a legacy was given to the executor, with a declaration in the will, that such a legacy should be in full for the trouble he might have in performing the duties of the will, and that he should not have any claim for commission, or derive any advantage from keeping in his possession any sums of money, without duly accounting for the legal interest thereof. The testator then disposed of the residue upon certain trusts for his children, and directed that a sufficient part of the interest of the portions should be applied to the maintenance, &c. of each child, and the surplus should be accumulated. The executor did not lay the money out as directed, but kept upwards of 30,000*l.* in his hands, and used it in his trade, so that there was a wilful violation of the will, which prohibited retainer and directed accumulation. And Lord Loughborough decreed that an account should be taken from the moment of the testator's death, and interest be charged upon all the sums received, and rests to be made half-yearly upon the balance, including intermediate interest; so that double compound interest was given. The cause came on afterwards before Lord Eldon, upon exceptions to the master's report, and though his lordship did not approve of the decree, yet he agreed in the propriety of giving compound interest. So in *Knot v. Cottee*, (*h*)

(*e*) See accord. *Mayor of Berwick-upon-Tweed v. Murray*, 7 De G., M. & G. 497, 519, in which case Lord Cranworth said that it was a mistake to suppose that he had laid it down in *The Attorney General v. Alford*, that a defaulting trustee could never be charged with more than 4*l.* per cent. [See *Lewin Trusts* (5th Eng. ed.), 276, 277. In *Burdick v. Garrick*, L. R. 5 Ch. App. 241, Lord Hatherley L. C. said: "The principle laid down in the case of *Attorney General v. Alford* appears to be the sound principle, namely, that the court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's money by directing rests, or

payment of compound interest, but proceeds upon this principle, either that he has made, or has put himself into such a position as that he is presumed to have made five per cent. or compound interest, as the case may be. If the court finds that the money has been invested in an ordinary trade, the whole course of decisions has tended to this, that the court presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in those cases the court directs rests to be made."]

(*f*) *Robinson v. Cumming*, 2 Atk. 410.

(*g*) 11 Ves. 92; 13 Ves. 407, 590.

(*h*) 16 Beav. 77.

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where there was an express trust for accumulation, Romilly M. R. held that, though the circumstances were not such as to make it right to charge the * executor with more than 4l. per cent. interest on moneys which he had improperly invested, yet it was a case for annual rests. And other instances, where, in executors' accounts, interest has been given with rests will be found in the cases cited in the note below. (i) And it has been held by Romilly M. R. on two late occasions, (k) that if an executor employs the assets in trade or speculation, for his own benefit, he shall be charged either with the profits actually so obtained by him for the use of the money, or with compound interest at 5l. per cent. (k¹)

(i) *Stackpoole v. Stackpoole*, 4 Dow. 209; *Willson v. Carmichael*, 2 Dow & Cl. 58; *Walker v. Woodward*, 1 Russ. 107; *Townend v. Townend*, 1 Giff. 201; *Walrond v. Walrond*, 29 Beav. 586. See, also, on this subject, *Binnington v. Harwood*, 1 Turn. & R. 481, and Lord Brougham's judgment in *Docker v. Somes*, 2 My. & K. 655; [*Karr v. Karr*, 6 Dana, 3; *Hodge v. Hawkins*, 1 Dev. & Bat. Eq. 564; *Lesley v. Lesley*, 1 Dev. Eq. 117; *Bowles v. Drayton*, 1 Desaus. 489; *Latimer v. Hanson*, 1 Bland, 51; *Winder v. Diffenderffer*, 2 Bland, 166; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *McKnight v. Walsh*, 23 N. J. Eq. 136; S. C. 24 N. J. Eq. 498; *Blake v. Pegram*, 109 Mass. 541.]

(k) *Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, 15 Beav. 461.

(k¹) [Where an administrator employed the moneys, belonging to the intestate's estate, in trade for his own benefit, of the profits of which he refused or was unable to give any account, the court charged him with compound interest, making annual rests in the accounts, for that purpose, after allowing a reasonable time for settling the estate. In making the yearly rests, the administrator was charged with compound interest, commencing from the 16th of July, 1805, on the balance then remaining in hand, i. e. one year's interest was calculated on such balance, and added to the principal due on the 16th of July, 1806, and both made principal, upon

which aggregate sum interest was again calculated for another year, to the 16th of July, 1807, and added to the balance of principal due on that alone, and so on, for each year, during the whole term. *Schiefelin v. Stewart*, 1 John Ch. 620; *Garniss v. Gardiner*, 1 Edw. Ch. 128; *Vanderheyden v. Vanderheyden*, 2 Paige, 287; *Ackerman v. Emott*, 4 Barb. 626; *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Latimer v. Hanson*, 1 Bland, 51; *Diffenderffer v. Winder*, 8 Gill & J. 341; *McKnight v. Walsh*, 24 N. J. Eq. 498; *Wright v. Wright*, 2 McCord Ch. 185; *Robbins v. Hayward*, 1 Pick. 528, note; *Hodge v. Hawkins*, 1 Dev. & Bat. Eq. 566; *Swindall v. Swindall*, 8 Ired. Eq. 286; *Greening v. Fox*, 12 B. Mon. 190; *Blake v. Pegram*, 109 Mass. 541; *Karr v. Karr*, 6 Dana, 3, where biennial rests were thought proper; *Clemens v. Caldwell*, 7 B. Mon. 171; *Luken's Appeal*, 7 Watts & S. 48; *Fall v. Simmons*, 6 Geo. 272; *Kenan v. Hall*, 8 Geo. 417, where, under the circumstances, interest was charged annually, and compounded every six years. In *Spear v. Pinkham*, 2 Barb. Ch. 213, Chancellor Walworth said: "Where an executor mixes up the trust funds with his own, or neglects to keep regular accounts of the investments and interest received upon such funds from time to time, there is no other way in which justice can be done to the *cestuis que trust*, than to charge him with interest as if the fund had been kept invested upon interest, payable pe-

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His honor, however, observed, that the principle on which executors have been charged with compound interest has not been clearly defined, nor are the decided cases by any means free from obscurity or contradiction. The principle of some of them seems to have been, that the court ought to visit the executor as it were with a penalty, when he has not merely misconducted himself, but has derived, or tried to derive, a profit for himself from the use of the money. And it has not unfrequently been said, that in order to make out a claim for compound interest, a very strong case of violation of duty is required. (*l*) But there has already been occasion to mention that, in the latest case on this subject, (*m*) Lord Cranworth repudiated the doctrine of *punishing* the executor, (*m*¹) and maintained the principle, with respect to compound as well as simple interest, that the court ought to charge him only with the interest which he has received, or which the court is justly entitled

periodically, and as if the payments had been made by him from the interest and principal thus received and in hand when the several payments from the trust fund were made by him. See *Garniss v. Gardiner*, 1 Edw. Ch. 128; *Blake v. Pegram*, 109 Mass. 541; *Hook v. Payne*, 14 Wallace, 252. And so an executor, who refuses to render an account of the use which he has made of the money in his hands, but claims it as his own, who has been in the habit of receiving compound interest, and who repels in an unsatisfactory manner, the imputation of fraud or gross negligence, is chargeable with compound interest, with annual rests, from the time when he ought to have settled his administration account. *Jennison v. Hapgood*, 10 Pick. 77, 104, 105. Annual rests were allowed in *Harland's Accounts*, 5 Rawle, 329. But under Penn. act of March 29th, 1832, § 7, compound interest cannot be charged to an executor, administrator, or guardian. *Norris's Appeal*, 71 Penn. St. 106, 123, 124. See *Dietterich v. Hest*, 5 Penn. St. 91; *McCall's Estate*, 1 Ashm. 357; *Light's Appeal*, 48 Penn. St. 180; *Pennypacker's Appeal*, 41 Penn. St. 44; *Hughes's Appeal*, 53 Penn. St. 500; *Granes's Appeal*, 50 Penn. St. 189. But he may be charged as profits with more than compound inter-

est when he has used the money, and be punished by disallowing commissions, &c. *Norris's Appeal*, 71 Penn. St. 106. See, further, *Ker v. Snead*, 11 Law Rep. (Boston), 217, in which this subject of compound interest was very learnedly discussed in the circuit superior court of Accomac County, Virginia.]

(*l*) See *Crackelt v. Bethune*, 1 Jac. & W. 586; *Tebbs v. Carpenter*, 1 Madd. 290. [To justify the allowance of compound interest, there must be some special and peculiar circumstances, involving a breach of duty, beyond mere neglect. *Ackerman v. Emott*, 4 Barb. 626; *Fay v. Howe*, 1 Pick. 527, 528, and note (1); *Garniss v. Gardiner*, 1 Edw. Ch. 128; *Fall v. Simmons*, 6 Geo. 272; *Kenan v. Hall*, 8 Geo. 417; *Cartledge v. Cutliff*, 21 Geo. 1; *Clemens v. Caldwell*, 7 B. Mon. 171; *Grier J. in Barney v. Saunders*, 16 How. (U. S.) 542, 543. A case of gross delinquency or of known violation of duty must be shown. *Boynton v. Dyer*, 18 Pick. 1; *De Peyster v. Clarkson*, 2 Wend. 77; *Ackerman v. Emott*, 4 Barb. 626; *Lansing v. Lansing*, 45 Barb. 182; *McKnight v. Walsh*, 24 N. J. Eq. 498.]

(*m*) *Atty. Gen. v. Alford*, *ante*, 1749.

(*m*¹) [See the remarks of Mr. Justice Grier in *Barney v. Saunders*, 16 How. (U. S.) 542.]

to say he ought to have received, or to presume he did receive. (*m*²)

* It may here be observed, that a considerable difference of opinion has existed as to the effect of a direction to the master "to make annual rests" in taking the account. In *Heighington v. Grant*, (*n*) Lord Langdale M. R., after reviewing all the authorities, denied that a direction to ascertain balances, to compute interest on such balances, and "in taking the said accounts" to make annual rests, followed by a direction that the party shall be charged with interest, "after the rate and in the manner aforesaid upon such balances," could, without more, be considered as a direction to charge the defendant with compound interest, as so much principal received into the account of the following year. And his lordship expressed his opinion that where compound interest is intended to be charged, a specific direction for that purpose should be given. But on appeal to Lord Cottenham C. his lordship, in an elaborate judgment, arrived at a different construction of the direction in question, and held that, under it, the interest computed on the balance due at the end of the first year was to form part of the balance due at the end of the second year, and upon which interest was then to be computed, and so on from year to year to the end of the account. (*o*)

An executor or administrator is entitled to be allowed all reasonable expenses which have been incurred in the conduct of his office, (*p*) except those which arise from his

Allow-
ances to
executor:

(*m*²) [See *Manning v. Manning*, 1 John. Ch. 527; *Prescott's Estate*, 1 Tuck. N. Y. Sur. 430; *Hood's Estate*, 1 Tuck. N. Y. Sur. 396; *McKnight v. Walsh*, 24 N. J. Eq. 498; *Light's Appeal*, 24 Penn. St. 181; *English v. Harvey*, 2 Rawle, 305. In *Utica Ins. Co. v. Lynch*, 11 Paige, 524, it was said that the principal was to allow the *cestui que trust* to elect between simple interest and the profits, and that rests or compound interest was only a convenient mode adopted by the court to charge the trustee with the profits supposed to have been made by him in the use of the money.]

(*n*) 5 My. & Cr. 258.

• (*o*) 5 My. & Cr. 258; [*ante*, 1851, note (*k*¹); *Schieffelin v. Stewart*, 1 John. Ch. 620.]

(*p*) *Potts v. Leighton*, 15 Ves. 277; *Hyde v. Haywood*, 2 Atk. 126; stat. 22 & 23 Vict. c. 35, s. 31, *ante*, 1828. In these should be included the expenses of keeping up the testator's domestic establishment for a reasonable time after his death. *Field v. Peckett*, 29 Beav. 576. [Executors and administrators are entitled to be allowed, in settling their accounts, all reasonable charges and disbursements for the benefit of the estate they represent, and a reasonable recompense for their personal trouble in settling the estate, in preference to the claim of any creditor to the estate. *Nimms v. Commonwealth*, 4 Hen. & Munf. 57; *Edelen v. Edelen*, 11 Md. 415; *Clarke v. Blount*, 2 Dev. Eq. 51; *Whitted v. Webb*, 2 Dev. & Bat. Eq. 442; *Pearson v. Dar-*

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own default. (*q*) But it is a general principle, that an executor for his ex- or administrator shall have no allowance, at law or in
penses: equity, for personal trouble and loss of time in the execu-
for his tion of his * duties. (*r*) Nor is the case altered by the ex-
trouble:

rington, 32 Ala. 227; *Re Wilson*, 2 Penn. St. 325; *Glover v. Halley*, 2 Bradf. Sur. 291; *Williamson v. Williamson*, 6 Paige, 298. He is entitled to all the allowances which are made in favor of agents generally. *Henderson v. Simmons*, 38 Ala. 291. As to allowance for funeral expenses, gravestones, monuments, &c. see *ante*, 968 *et seq.* and notes. An administrator will not be allowed, on the settlement of his account, for money paid out for car or coach fare for himself and wife, or for a sister and her husband, to attend the funeral of a brother, nor will the administrator be allowed pay for his time or services in attending such funeral. *Lund v. Lund*, 41 N. H. 355, 361, 362. The impropriety of a claim for an allowance of such items in that case is very forcibly stated by Sargent J. in the above case. But extraordinary cases may occur, in which an allowance may properly be made to an administrator for travelling expenses in accompanying the conveyance of the body of the deceased from a distant city, where he had suddenly died, to the place where he had previously resided, and so for the expense of a special messenger to communicate intelligence of the death of the deceased to his family; and also for other necessary charges attending his interment. *Mann v. Lawrence*, 3 Bradf. Sur. 424; *Malony's Appeal*, 11 Serg. & R. 204; *Wall's Appeal*, 38 Penn. St. 464.]

(*q*) *Pannell v. Fenn*, Cro. Eliz. 848; [*Brackett v. Tillotson*, 4 N. H. 208; *Robbins v. Wolcott*, 27 Conn. 234; *Jennison v. Hapgood*, 10 Pick. 77.] He shall not be allowed the costs of an action against him as executor, which he ought never to have defended. *Chambers v. Smith*, 2 Coll. 742; *Smith v. Chambers*, 2 Phil. C. C. 221.

(*r*) *Robinson v. Pett*, 3 P. Wms. 251;

Scattergood v. Harrison, Mosely, 130; *Brocksopp v. Barnes*, 5 Madd. 90. [Allowance was made to executors for trouble and loss of time in managing the testator's leasehold property and carrying on his business, in *Forster v. Ridley*, 4 De G., J. & Sm. 452. It is remarked by Mr. Justice Story that "the duties and responsibilities of the office of a trustee are sufficiently onerous and perplexing in themselves; and mistakes, even of the most innocent nature, are sometimes visited with severe consequences, nor can any one reasonably expect any trustee to devote his time or services to a very watchful care of the interests of others, when there is no remuneration for his services, and there must often be a positive loss to himself, in withdrawing from his own concerns some of his own valuable time. To say that no one is obliged to take upon himself the duty of a trustee, is to evade and not to answer the objection. The policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interest, to accept the office, and to take away the temptation to abuse the trust for mere selfish purposes, as the only indemnity for services of an important and anxious nature. The very circumstance that trustees now often stipulate for a compensation before accepting the office, and that courts of equity now sanction such an allowance, is a distinct proof that the rule does not work well, and is felt to be inconvenient or unreasonable in practice." 2 Story Eq. Jur. § 1268, note. Such seems to be the view generally taken throughout the American States; and though, at an early period, some of the states, such as New York and Delaware, recognized the English rule, yet in them, as in New York, its judicial adoption called forth almost immediate legislative interference; while in others, the allow-

ecutor's renunciation of the executorship, and his afterwards assisting in it ; nor although it should appear that he has deserved more,

ance of a compensation to all acting in a fiduciary capacity, either formed a part of their local common law, or proceeded from an equitable construction of some statute, and trustees, executors, and administrators are now entitled to compensation for their time and trouble, either in the form of a commission upon the property under their care, or of a gross sum allowed to them as compensation for their services. *Barney v. Saunders*, 16 How. (U. S.) 542; *Shirley v. Shattuck*, 6 Cush. (Miss.) 26; *Clark v. Platt*, 30 Conn. 282. "The general principle," it is remarked by Mr. Perry (Trusts, vol. ii. § 918), "prevails in all the states except Delaware, and, perhaps, Ohio and Illinois, that trustees are to have a reasonable compensation for their time, trouble, and skill in managing the fund and in executing the trust, although there is some diversity in the manner of determining the amount. In the larger number of states the compensation is determined by a percentage or commission upon the trust fund, and this commission varies somewhat in the different states. In some states a gross sum is allowed for time and trouble, and in others a per diem compensation is made for time, travel, and labor. In many states the percentage or commission is established by statutes; in others, the rates are adjusted upon equitable principles. These statutes generally refer to the fees or compensation of executors, administrators, and guardians; but the courts, by equitable construction, have extended their provisions to trustees and others performing fiduciary duties. But if it appears, from the instrument of trust or otherwise, that it was the intention that no compensation should be made; none will be allowed." See *Northern Central R. R. Co. v. Keighton*, 29 Md. 572; *Mason v. Roosevelt*, 5 John. Ch. 534. Where the amount of compensation is fixed in the instrument of trust, that will govern. *College of Charleston v. Wellington*, 13 Rich. Eq. 195. So far as this subject is regulated

by legislation the reader is referred to the statutes of the states which thus regulate it. These have been carefully and industriously collected and cited by Mr. Perry, in his notes to the statement of the law above quoted, from his work on Trusts. In the same notes he has very extensively referred to the cases in the several states, showing the rules adopted in each state, or the construction given to their statutes, upon the subject of compensation to trustees, executors, and administrators; to these notes the reader is referred. In several of the states the amount of compensation appears to be very much within the discretion of the court. In Massachusetts executors and administrators are allowed their reasonable expenses, incurred in the execution of their respective trusts, and such compensation for their services as the court in which their accounts are settled considers just and reasonable. *Genl. Sts. Mass. c. 98, § 10*; *Longley v. Hall*, 11 Pick. 120, 124; *Rathbun v. Cotton*, 15 Pick. 471. So, in New Hampshire, the compensation of executors and administrators for their services, and other allowances, are within the discretion of the court. *Wendell v. French*, 19 N. H. 205, 210; *Tuttle v. Robinson*, 33 N. H. 104, 118. So in Connecticut. See *Cantfield v. Bostwick*, 21 Conn. 555; *Kendall v. New England Carpet Co.* 13 Conn. 392; *Clark v. Platt*, 30 Conn. 282. So in Pennsylvania. *Wilson v. Wilson*, 3 Binn. 560; *Pusey v. Clemson*, 9 Serg. & R. 209; *Walker's Estate*, 9 Serg. & R. 225; *Marsteller's Appeal*, 4 Watts, 268; *Harland's Accounts*, 5 Rawle, 331; *Shunk's Appeal*, 2 Penn. St. 307; *Stephenson's Estate*, 4 Whart. 104; *Nathans v. Morris*, 4 Whart. 389; *Prevost v. Gratz*, 3 Wash. C. C. 434. So in Alabama; *Harris v. Martin*, 9 Ala. 899; *Gould v. Hayes*, 25 Ala. 432; and in Kentucky; *Ramsey v. Ramsey*, 4 Monr. 151; *Phillips v. Bustard*, 1 B. Mon. 350; *Greening v. Fox*, 12 B. Mon. 190; *Lane v. Coleman*, 8 B. Mon. 571; *Wood v. Lee*,

and has benefited the estate to the prejudice of his own affairs. (s) And even where an executor in trust, who had no legacy, in a case in which the execution of the office was likely to be attended with trouble, at first declined, but afterwards agreed with the re-

5 Monr. 50. Where a trust held by an executor is inseparable from the executorship, he is not entitled to double commissions, first in his character of executor, and again in his character of trustee. *Valentine v. Valentine*, 2 Barb. Ch. 430; *Aston's Estate*, 4 Whart. 241; *Stephenson's Estate*, 1 Parsons Eq. 19; *Holly v. Sur. Gen.* 4 Edw. Ch. 284; *Miller v. Congdon*, 14 Gray, 114, 118. See *Jones's case*, 4 Sandf. Ch. 616; *Kellogg's case*, 7 Paige, 267; *White v. Bullock*, 20 Barb. 99; *Blake v. Pegram*, 101 Mass. 592. Unfaithful administration will not deprive an executor or administrator of a right to compensation for his services so far as they have been beneficial to the persons interested in the testator's estate. *Jennison v. Hapgood*, 10 Pick. 77, 112; *Stevenson's Estate*, 4 Whart. 98; *Glover v. Holly*, 2 Bradf. Sur. 291; *Peyton v. Smith*, 2 Dev. & Bat. 325; *Thompson v. McDonald*, 2 Dev. & Bat. 471. See *Tiner v. Christian*, 27 Ark. 306. But it is otherwise where his wilful default or gross negligence has occasioned loss to the estate. *Gould v. Hayes*, 19 Ala. 438; *Hall v. Wilson*, 14 Ala. 295; *Blake v. Pegram*, 109 Mass. 541, 557. But in some cases it has been held that compensation being a matter of discretion it may be refused for misconduct. *Powell v. Powell*, 10 Ala. 914; *Gould v. Hayes*, 25 Ala. 432; *Doneldson v. Pusey*, 13 Ala. 752; *O'Neill v. Donnell*, 9 Ala. 738; *Hall v. Wilson*, 14 Ala. 295; *Walker v. Walker*, 9 Wallace, 743; *Hermstead's Estate*, 60 Penn. St. 423; *Norris's Appeal*, 71 Penn. St. 106, 126; *Robinett's Appeal*, 38 Penn. St. 112; *Berryhitt's Appeal*, 35 Penn. St. 245; *Aston's Estate*, 4 Whart. 240; *McCahan's Appeal*, 7 Penn. St. 59; *Stehman's Appeal*, 5 Penn. St. 414. Where no account has ever been reported by the trustee for allowance, and where the trust funds have been retained in his hands, without distinct and separate

investment, no commission will be allowed to the trustee, in New Jersey. *McKnight v. Walsh*, 24 N. J. Eq. 498, 506, 507; *Jackson v. Jackson*, 2 Green Ch. 113; *Frey v. Frey*, 2 C. E. Green, 71; *Warbass v. Armstrong*, 2 Stockt. 263. The rule was thus stated in *Holman's Appeal*, 24 Penn. St. 174: "It is hardly necessary to say that where there is no evidence of a proper attention to the duties of the trust, where no account has been settled for thirty years, and then only where a settlement was compelled by law, and where a very unfair exhibit was made when the account was presented, no compensation ought to be allowed to the executor." See *Witman & Geisinger's Appeal*, 28 Penn. St. 376; *Stearley's Appeal*, 38 Penn. St. 525; *Smith's Appeal*, 47 Penn. St. 424; *Swartswalter's Account*, 4 Watts, 77; *Dyott's Estate*, 2 Watts & S. 557; *Robinett's Appeal*, 36 Penn. St. 191. So in *Blake v. Pegram*, 109 Mass. 541, it was held that a guardian, who for many years has had a large surplus of his ward's money in his hands, and in his account has charged himself therewith, and with interest thereon, but refuses to disclose what use he has made of it, will be allowed no commission on his ward's income received by him. But compensation will not be refused for a mere mistake in judgment. *Meyer's Appeal*, 62 Penn. St. 109. The compensation is the same though there be several executors; if their trouble and services are unequal, their shares of the compensation will be proportionate. *Walker's Estate*, 9 Serg. & R. 223; *Hodge v. Hawkins*, 1 Dev. & Bat. Eq. 564; *Stevenson's Estate*, 1 Parsons Eq. 19; *Grant v. Pride*, 1 Dev. Ch. 269; *Waddill v. Martin*, 3 Ired. Eq. 562. An executor *de son tort* will not be allowed commissions. *Hagler v. McCombs*, 66 N. Car. 345.]

(s) *Robinson v. Pett*, 3 P. Wms. 249.

siduary legatee, in consideration of a hundred guineas, to act in the executorship, and on his dying before the execution of the trust was completed, his executors filed a bill to be allowed that sum out of the trust money in their hands; the court refused the claim, observing, that independently of the executor's having died before the trust was executed, such bargains ought to be discouraged, as tending to dissipate the property. (t) So a surviving partner, being executor, is not entitled, without expressed stipulation, to any allowance for carrying on the trade after the testator's death. (u) Again, in *New v. Jones*, (x) it was held by Lord Lyndhurst C. B. that if a solicitor or attorney, who is an executor, does professional business himself for the benefit of the estate, he is not entitled to be paid his * bill of costs for such services; it would be placing his interest at variance with the duties he has to discharge. (y) Accordingly, in *Moore v. Frowd*, (z) Lord Cottenham held that a trustee, who is a solicitor, is entitled to be repaid such costs, charges, and expenses only as he has properly paid out of his pocket; and that it makes no difference in this respect, that the instrument creating the trust may have directed that the trust moneys should be applied (*inter alia*) in payment of all expenses, disbursements, and charges to be incurred, sustained, or borne by the trustee, in professional business, journeys, or otherwise, and that the trustee might retain all reasonable costs, charges, and expenses which he might sustain, or be put unto, such costs, charges, and expenses to be reckoned, stated, and paid as between attorney

(t) *Gould v. Fleetwood*, 3 P. Wms. 251, note (A). So in *Ayliffe v. Murray*, Atk. 58, two persons, executors and trustees under a will, would not prove the will nor suffer the *cestui que trust* to take out letters of administration *cum testamento annexo*, till he had executed a deed, by which he was to pay a hundred pounds to one executor and two hundred pounds to the other, within six months after they should have exhibited an inventory. Lord Harwicke declared the deed was unduly obtained, and decreed that no allowance should be made for the sum of 100*l.* and 200*l.* to the plaintiffs.

(u) *Burden v. Burden*, 1 Ves. & B. 170; *Stocken v. Dawson*, 6 Beav. 371. Nor is an executor and legatee of such surviving partner. 6 Beav. 371.

(x) Exchequer, August 9, 1833. The writer is indebted to the kindness of Mr. Younge, for the note of this decision, which is inserted in 9 Bythewood's Convey. 337, 338. It is also reported in a note to *Cradock v. Piper*, 1 Mac. & G. 668.

(y) See, also, *Wilson v. Carmichael*, 2 Dow & Cl. 51; 1 Mac. & G. 678, 679; *Nicholson v. Tutin*, 3 Kay & J. 159; [*Munn's Estate*, 1 Tuck. N. Y. Sur. 136; *Collier v. Munn*, 41 N. Y. 143. But see *Wendell v. French*, 19 N. H. 205; *Wells J. in Blake v. Pegram*, 109 Mass. 541, 553, 554; *Fulton v. Davidson*, 3 Heisk. (Tenn.) 614; *post*, 1861; *Morgan v. Nelson*, 43 Ala. 586.]

(z) 3 My. & Cr. 45.

and client. Again, in *Collins v. Carey*, (a) where business relating to a trust estate had been transacted by two solicitors in partnership, one of whom was a trustee of the estate, Lord Langdale M. R. held, that, in passing the accounts of the trustee, costs out of pocket alone could be allowed. (b) And the general rule that a trustee acting as solicitor in the trust matters is merely entitled to costs out of pocket has been firmly established by several subsequent decisions. (c) And * the rule is not restricted to cases of express trust, but applies to the case of an executor or trustee, though there be no express trust. (d) But the rule does not apply to the costs incurred *in a suit* where the solicitor acts in the suit for himself and his co-trustees. In such a case he shall be allowed the full costs which would be properly chargeable by a stranger to the trust, taking care that they are not to be increased by his being one of the parties. (e) This exception, however, in favor of the solicitor, does not extend to a case where a solicitor, who is a trustee, acts in a suit for himself alone, or by his partner for himself alone, (f) nor to a case of a solicitor, being a trustee and acting as solicitor for himself and his co-trustees in the administration of the trust *out of court*. (g) And where an executor and

(a) 2 Beav. 128.

(b) And the rule is the same, though the business is done by one of the partners who is not trustee. *Christophers v. White*, 10 Beav. 529.

(c) *Fraser v. Palmer*, 4 Y. & Coll. 515, *coram Alderson B.*; 1 Mac. & G. 679; *In re Sherwood*, 3 Beav. 338; *Bainbrigge v. Blair*, 8 Beav. 558; *Todd v. Wilson*, 9 Beav. 486. The costs in such cases, of a defendant, are ordered to be taxed as between solicitor and client, without any special directions. *York v. Brown*, 1 Coll. 260. And under such an order, or under an order to tax costs generally, the taxing masters may take notice that the solicitor is also a trustee, and apply the rule. *Cradock v. Piper*, 1 Mac. & G. 664. But the rule does not preclude an executor who acts as solicitor in a cause in which he is a party in his representative character, from being allowed, as against the estate, that proportion of the whole costs which his town agent in the cause was entitled to receive. *Burge v. Brutton*, 2 Hare,

373. See *In re Taylor*, 18 Beav. 165.

And it must be observed that the rule does not disentitle a solicitor, who is a trustee, from claiming his professional charges under a special contract, nor, it should seem, under a will authorizing him expressly to make such charges. 3 Beav. 341; 10 Beav. 524, by Lord Langdale. See, also, 5 De G., M. & G. 166, by Lord Cranworth; *Harbin v. Derby*, 28 Beav. 325, *post*, 1861. Compensation may, in special cases, be made, under the authority of the court, to a trustee acting as solicitor in the trust matters; though not by allowing him to make the usual professional charges. *Bainbrigge v. Blair*, 8 Beav. 588. [See cases in note (y), *supra*.]

(d) *Pollard v. Doyle*, 1 Drew. & Sm. 319.

(e) *Cradock v. Piper*, 17 Sim. 41; 1 Mac. & G. 664. See, also, the observations of Lord Cranworth on this case in *Broughton v. Broughton*, 5 De G., M. & G. 164, 165.

(f) *Lyon v. Baker*, 5 De G. & Sm. 622.

(g) *Lincoln v. Windsor*, 9 Hare, 158.

trustee under a will employs his co-trustee, who is a solicitor, to transact the legal business of the trust, the solicitor is only entitled to costs out of pocket. (*h*)

Again, an agent, who is appointed executor of his principal, is not entitled to charge commission on business done sub-
sequently to the testator's death. (*i*) So an executor, who is one of a banking firm, cannot charge the ordinary

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*banker's commission against the testator's estate. (*k*) So an executor, who acts as auctioneer in the sale of assets, is not entitled to charge commission. (*l*) But where a testator, a victualler, directed his trade to be carried on by his executors, brewers and spirit merchants, who had been in the habit of serving him in his lifetime, and supplies were furnished for that purpose by them, the court would not declare that the executors were entitled to receive the cost price only for these supplies, but directed an inquiry whether the supplies were proper, and furnished at the ordinary market price. (*m*) So in *Willis v. Kimble*, (*n*) a testator devised and bequeathed his freehold and leasehold estate to trustees for sale, and he declared that his trustees respectively should be entitled to have and receive out of the trust moneys, all costs, charges, and expenses, fees to counsel and for advice, and for professional assistance, and loss of time, paid, incurred, sustained, or occasioned in or about the execution of the said trusts, or in anywise relating thereto. One of the trustees was a land surveyor, and he superintended the management and sale of the estates. And Lord Langdale M. R. held that he was entitled, upon the terms of the will, to a compensation for loss of time. Again, it is competent for the court to appoint an executor and trustee consignee with the usual profits. (*o*) And when the court in its discretion has made such an appointment, and the appointment has been acted upon, the court will not afterwards withdraw its sanction from it. (*p*)

It has been holden that agents, being also appointed execu-

(*h*) *Broughton v. Broughton*, 5 De G., M. & G. 160; 2 Sm. & G. 422. partnership make a charge. *Matthison v. Clarke*, 3 Drew. 3.

(*i*) *Sheiff v. Axe*, 4 Russ. 33.

(*m*) *Smith v. Langford*, 2 Beav. 362.

(*k*) *Heighington v. Grant*, Rolls. Hil. T. 1840; 5 My. & Cr. 258, 262.

(*n*) 1 Beav. 559.

(*l*) *Kirkman v. Booth*, 11 Beav. 273.

(*o*) *Marshall v. Holloway*, 2 Swanst.

Nor, if he is a partner with others, can the

(*p*) *Morison v. Morison*, 4 My. & Cr. 215.

tors, are not entitled to commission upon remittances from India to this country by the testator, not received *until after his death. (q) But the courts of India, in order to induce proper persons to accept the office of executor, have adopted a rule, opposed to the principles above stated, by permitting an executor to charge a commission upon the amount of assets collected by him in India. And if assets, collected in India, come to be administered, not in India, but by the courts in England, the courts here are of necessity bound to follow that rule of policy which has been adopted in India. For if, in the event of the accounts having been passed in India, the executors would have been entitled to a commission, it would be great injustice to withhold that allowance, because the accounts happened to be passed in this country, and not in India. (r) It has, therefore, been long established, that the courts here must follow that peculiarity of the law of India, and that executors, in passing their accounts, shall, in respect of assets collected in India, be allowed the same commission here which would have been allowed them there. (s) And this claim to commission shall extend to the collection of moneys belonging to the testator which were in the hands of a commercial house in which the executor is, and the testator was, a partner. (t)

The same exception to the general rule has been established with respect to the West Indies. The principle upon which the court of chancery has gone, in this respect, appears to be this: that the commission is in the nature of a remuneration to a trustee, who, besides the usual trouble belonging to the execution of his trust, has also to undergo all the *inconveniences arising from being in a foreign country, and conducting the business of a merchant there. And although, as it has above appeared, no commission is allowed to a trustee in this country for what he does, however laborious his duty may be, yet inasmuch as it is of great importance to get persons to assume the character of trustees in the East and West Indies, therefore, so long as they are actually in the country, there discharging the duty of trustees, the court

(q) *Hovey v. Blakeman*, 4 Ves. 596. the executor acted as factor, he should be allowed commission for it.

However, in *Scatterwood v. Harrison*, Mosely, 130, Lord King held that where (r) 2 Russ. 589, 590.

a factor was made executor, if anything appeared to have been consigned to him (s) *Chetham v. Audley*, 4 Ves. 72; *Mathews v. Bagshaw*, 14 Beav. 123.

by the testator in his lifetime, though it (t) *Cockerell v. Barber*, 1 Sim. 23; S. came to his hands after his death, since C. 2 Russ. 585.

allows the commission. (*u*) But no commission is payable where the remittant himself is actually, at the time of the remittance, in this country. (*x*) And it should seem, that, in order to entitle himself to the commission, the party must himself be actually in the colony where the remittance was made. For if by any means money, which has not been received by him upon the spot and remitted by him from the spot to this country, is remitted to this country, it appears to be the settled rule of the court of chancery that the commission shall not be allowed. (*y*) And accordingly, in a modern case, (*z*) it was held that if an executor in India collects part of the assets there, and then comes to England, and has the remainder remitted to him by his agent, he is entitled to commission on that part only which he collected in India. (*a*)

* Where, indeed, the will gives a legacy to the executor, expressly in respect of his trouble in the execution of his duty, in India, as executor, the question no longer is what is the law of India, but what was the intention of the testator, in the expressions used by him, as applied to the law of India. And it has been holden in such case, that the terms of the will must be considered as a declaration of the intention of the testator that the executor should be excluded from the commission to which the law of India would have entitled him, and that he can claim nothing more than the legacy which the testator has expressed to be a sufficient compensation for his trouble in performing the duties of executor. (*b*) But where the legacy is not given to the executor

(*u*) 1 Moore Priv. C. C. 40.

(*x*) 4 Ves. 72; Ib. 596.

(*y*) *Chambers v. Goldwin*, 5 Ves. 834; *Denton v. Davy*, 1 Moore Priv. C. C. 15, 32. In this last case it was holden by the lords of the privy council that the commission of 6*l.* per cent. given by the Jamaica act, 24 Geo. 2, c. 19, to agents, trustees, guardians, executors, &c. for the management and disposal of the rents and profits of an estate, being in the nature of a remuneration for the trouble and responsibility of conducting the business of a merchant on the island, is payable only to persons actually resident on the island, and capable and willing to act in the trusts of the estate; and the commission of 5*l.* per cent. given by the same act for receiving and remitting moneys can only be

claimed where the receipts or payments are actually made on the island.

(*z*) *Campbell v. Campbell*, 13 Sim. 168.

(*a*) Where the testator died possessed of certain notes of the Bengal government, which the executors took from the treasury at Calcutta, and handed over to certain trustees, in discharge of a legacy of the testator of equal amount with the notes, it was held that the notes were assets, in respect of which Indian commission ought to be allowed. *Campbell v. Campbell*, 2 Y. & Coll. C. C. 607.

(*b*) *Freeman v. Fairlie*, 3 Meriv. 24. And the executor cannot be allowed, in passing his accounts, after a series of years to renounce his legacy and charge commission. Ib.

in his character of executor, (c) he will be entitled to commission on all assets collected by him in India, including the assets which he retains in respect of his own legacy. *(d)*

Generally speaking, an executor who has proved the will, or a person taking out letters of administration, cannot retire from his duty, but must collect the estate himself. *(e)* However, an executor is justified in having recourse to an agent to collect the assets, in cases where a provident owner might well employ a collector; and the executor will, therefore, be allowed the expense so incurred, in his accounts. *(f)*

* Accordingly, where a testator gave annuities to his executors for their trouble in the execution of his will, and died possessed of several houses, let at weekly rents, it was held that the executors were justified in paying a person to collect the rents, and did not therefore lose their annuities. *(g)* So, if there are assets in India, the executor shall be allowed the expense of an agent to collect them. And, therefore, the court will appoint a receiver in India of a testator's assets, on the application of an executor resident in England. *(h)*

So, on one occasion, *(i)* it was holden that, from the nature of the accounts, the executor was justified in employing an accountant, and that the expense ought to be allowed to the executor.

(c) See *ante*, 1281-1283, as to the question where a legacy is to be regarded as given to an executor in that character.

(d) *Cockerell v. Barber*, 1 Sim. 23; 2 Russ. 585.

(e) *Weiss v. Dill*, 3 My. & K. 26; [*Gwynn v. Dorsey*, 4 Gill & J. 453; *Edmonds v. Crenshaw*, 1 Harper Ch. 224.]

(f) See *Bonithon v. Hockmore*, 1 Vern. 316; *Davis v. Dendy*, 3 Madd. 170; [*McWhorter v. Benson*, Hopkins, 28; *Kennedy's Appeal*, 4 Penn. St. 150.] See, also, *Hopkinson v. Roe*, 1 Beav. 180, in which case Lord Langdale M. R. held that the executors, under the circumstances, were justified in appointing an agent to get in the testator's debts, and in allowing him a salary for his trouble. But the costs of transferring funds, from the name of a testator into the names of the executors, were disallowed. And his lordship held that the sum to be allowed executors for the expenses of transferring a large sum of

money into court is one guinea; and extra brokerage was, therefore, disallowed. But where an executor, upon transferring stock to a legatee, paid one sixteenth per cent. to a stock broker for identifying him (the executor) at the bank, it was held that he ought to be allowed this payment. *Jones v. Powell*, 6 Beav. 418.

(g) *Wilkinson v. Wilkinson*, 2 Sim. & Stu. 237; S. P. as to an administrator, *Trezvant v. Frazer*, Hil. Term, 1832, before Sir L. Shadwell V. C. So, even at law it should seem that an executor, under a plea of *plene administravit*, will be allowed the reasonable charges of collecting the testator's debts. *Giles v. Dyson*, 1 Stark. N. P. C. 32.

(h) *Cockburn v. Raphael*, 2 Sim. & Stu. 453. But the receiver must give sureties resident in England. *Ib.*

(i) *Henderson v. M'Iver*, 3 Madd. 275; [*Henderson v. Simmons*, 33 Ala. 291.]

Again, if an executor pays an attorney for his trouble and attendance, in the transacting and conduct of the testator's affairs, he ought to be allowed and repaid what he so pays. (*k*) But an

(*k*) *Macnamara v. Jones*, Dick. 587; [*McElhenny's Appeal*, 46 Penn. St. 347; *Wilson's Appeal*, 41 Penn. St. 94; *Tuttle v. Robinson*, 33 N. H. 104; *Wendell v. French*, 19 N. H. 205; *Brady v. Dilley*, 27 Md. 570; *Stewart v. McMinn*, 5 Watts & S. 100; *Hawley v. James*, 16 Wend. 61; *Mumper's Appeal*, 3 Watts & S. 443; *Armstrong's Estate*, 6 Watts, 237; *Scott's Estate*, 9 Watts & S. 100; *Dietrich v. Heft*, 5 Penn. St. 97; *Pusey v. Clemson*, 9 Serg. & R. 389; *Lindsay v. Howerton*, 2 Hen. & Munf. 9; *Noel v. Harvey*, 29 Miss. 72; *Brandon v. Hoggatt*, 32 Miss. 335; *Sterrett's Appeal*, 2 Penn. 419. "The general rule is, that executors, who are obliged to employ counsel in the settlement of their accounts, shall be allowed to charge to the estate the reasonable fees of counsel." *Chapman J.* in *Forward v. Forward*, 6 Allen, 494, 497; *Trammel v. Philleo*, 33 Texas, 395; *Wood v. Goff*, 7 Bush (Ky.), 59. The executor or administrator is personally liable for the fees of counsel so employed, in the first instance. *Mygatt v. Willcox*, 1 Lansing, 55. But see, as to allowing counsel fees where the effect is to throw the expense on those who either have no interest, or an adverse interest in the course pursued, *Brinton's Estate*, 10 Penn. St. 411; *Royer's Appeal*, 13 Penn. St. 572. Thus, an administrator, *pendente lite*, has been held not to be entitled to a credit for counsel fees, paid to sustain the validity of an instrument propounded as the will of the deceased. *Dietrich's Appeal*, 2 Watts, 332; *Koppenhafer v. Isaacs*, 7 Watts, 170; *Royer's Appeal*, 13 Penn. St. 573. An executor, when an instrument propounded as a will is decided to be invalid, has in some cases been held not entitled to charge the estate with the expense of defending its validity. *Andrews v. Andrews*, 7 Ohio St. 143; *Browne v. Vinyard*, 1 Bailey Ch. 460; *Royer's Appeal*, 13 Penn. St. 460; *Mumper's Appeal*, 3 Watts & S. 441; in this last and

the preceding case, the reasons are given. But see *ante*, 376, note (*y*) and cases. "If a person appointed by it, as executor, be named also as a legatee or devisee, then as such he may be deeply interested also in establishing it to be the last will of the deceased. But it is clear that creditors and the rest of the world have no interest whatever in the question." *Mumper's Appeal*, 3 Watts & S. 443. In *Royer's Appeal*, 13 Penn. St. 573, *Bradford v. Boudinot*, 3 Wash. C. C. 122, was overruled, and *Geddis's Appeal*, 9 Watts, 284, explained. So where there is a contest between the executor and the distributees. "Where an estate is so situated," said *Huston J.* in *Sterrett's Appeal*, 2 Penn. 426, "that legal advice is proper to direct the course of the executors, or where they bring suits to recover part of the estate, or defend suits brought against them, counsel must be employed, and where they are employed to obtain what is honestly supposed to be the rights of the estate, the estate ought to pay the reasonable counsel fees. But where executors neglect to settle and pay, and are sued by creditors or cited by heirs, and employ counsel to defend them in their iniquity, no counsel fee should come from the estate. The man who is doing wrong must himself pay the expense of that wrong." *Heister's Appeal*, 7 Penn. St. 457; *Swatzwalter's Accounts*, 4 Watts, 77; *Mumma's Accounts*, 5 Am. Law Reg. 489. If an administrator, under an honest impression that a demand made against the estate of the deceased ought not to be paid, incurs expenses in litigating it, they should be allowed in the settlement of his administration accounts. *Green v. Fagan*, 15 Ala. 335; *Harris v. Savage*, 16 Ala. 286; *Harris v. Parker*, 41 Ala. 604; *Pearson v. Darrington*, 32 Ala. 227; *Effinger v. Richards*, 35 Miss. 540; *Warden v. Burts*, 2 McCord Ch. 73; *Atcheson v. Robertson*, 5 Rich. Eq. 39; *Clapp v. Cable*, 1 Dev. & Bat. Eq. 177; *Holmes v. Holmes*, 28 Vt.

executor is not entitled to be allowed, without question, the amount of the bill of costs which he has paid, *bonâ fide*, to the solicitor to the trust; and the officer * of the court, without regularly taxing the bill, will moderate their amount. (l) And it may here be observed, that an executor will not be allowed the charges of his solicitor for doing things which the executor ought strictly to do himself. (m) And, therefore, where a solicitor is appointed executor, and is to be at liberty to charge for his professional services, he is only entitled to charge for services strictly professional, and not for matters which an executor ought to do without the intervention of a solicitor, such as for attendances, to pay premiums on policies, attending at the bank to make transfers, attendances on proctors, auctioneers, legatees, and creditors. (m)

765; Crofton v. Ilsley, 6 Greenl. 48; Davis v. Rawlins, 2 Harr. (Del.) 125; Poin-dexter v. Gibson, 1 Jones Eq. 44; Sterrett's Appeal, 2 Penn. 419; Ammon's Appeal, 31 Penn. St. 311. An administrator has a right to an allowance, out of the estate, for money paid as counsel fees in establishing his controverted right to administer. Ex parte Young, 8 Gill, 285. But where a party litigates for himself, under the character of an executor or administrator, he cannot charge the estate with the fees paid to counsel; Garrett v. Garrett, 2 Strobb. Eq. 272; Anderson v. Anderson, 37 Ala. 683; nor with other costs of litigation. Wither's Appeal, 13 Penn. St. 582; Stephens's Appeal, 56 Penn. St. 409; Mims v. Mims, 39 Ala. 716; Villard v. Roberts, 1 Strobb. Eq. 393; Garrett v. Garrett, 2 Strobb. Eq. 272; Sherman v. Angel, 2 Hill Ch. 26; Brandon v. Hoggatt, 32 Miss. 335. The reasonable fees of attorneys, who were retained *bonâ fide* by a former personal representative, to protect the interests of the estate of the deceased, are, when paid by the administrator *de bonis non*, proper allowances in his favor, and being part of the expenses incident to the administration, the sum so paid cannot be abated, although the estate may be declared insolvent. Hearrin v. Savage, 16 Ala. 286; Lindsay v. Hower-ton, 2 Hen. & Munf. 9; Portes v. Cole, 11 Texas, 157; Davis v. M'Neill, 1 Ired. Eq.

344. So where an executor honestly and upon reasonable grounds propounds a paper for probate as a will, and afterwards resigns without paying the expenses, his successor may pay them and be allowed therefor. This, however, only includes legal expenses and reasonable fees paid to an attorney employed by him in good faith, and not money paid by way of compromise. Henderson v. Simmons, 33 Ala. 291. An administrator will not be allowed credit for counsel fees unless he has paid them; Modawell v. Holmes, 40 Ala. 391; Bates v. Vary, 40 Ala. 421; Thacher v. Dunham, 5 Gray, 26; Succession of Holbert, 3 La. Ann. 436; nor will counsel fees be allowed for more counsel than were needed; Crowder v. Shackelford, 35 Miss. 321; nor at all, unless the services were rendered for the benefit of the estate. Brandon v. Hoggatt, 32 Miss. 335; Satter-white v. Littlefield, 13 Sm. & M. 302.] In Stackpoole v. Stackpoole, 4 Dow. P.C. 226, an administrator was not allowed to set off a charge for poundage alleged to have been paid to his agent in the administration.

(l) Johnson v. Telford, 3 Russ. 477.

(m) Harbin v. Derby, 28 Beav. 325; [Beatty v. Clark, 20 Cal. 11; Holcomb v. Holcomb, 2 Beav. 415; Fulton v. Davidson, 3 Heisk. (Tenn.) 614; ante, 1854, and cases in note (y).]

With respect to the allowance of interest to executors upon sums advanced by them for the purposes of their trust, it has been held, that if an executor borrows money, or advances it out of his own pocket, to pay the debts of his testator which carry interest, or satisfy some of his testator's creditors who are very importunate and threaten to bring actions, he is entitled not only to be paid in full in priority to the creditors, (n) but also to an allowance of interest for the money so advanced or borrowed. (o) It may be observed, that it is contrary to the course of practice to allow interest to an execu-

Allowance
of interest
to executor
for money
advanced
by him.

(n) *Spackman v. Holland*, 2 Giff. 198; [*Woods v. Ridley*, 27 Miss. 119; *Pearson v. Darrington*, 32 Ala. 227; *Sims v. Sims*, 30 Miss. 333; *Liddel v. M'Vickar*, 6 Halst. 44. In *Munroe v. Holmes*, 13 Allen, 109, 110, 111, Hoar J. said: "An original executor or administrator is not obliged to incur expenses beyond the means which are placed in his power to discharge them; and he may and usually does protect himself by not permitting the estate to become his debtor. But circumstances may exist in which it is certainly not wrong in him, although it may not be a positive duty, to make advances for the benefit of the estate which he administers; and where by his death or removal he may be unexpectedly deprived of the power to reimburse himself for these advances. Where they have been made in good faith, and for the benefit of the estate, we can have no doubt that they in some form become a charge upon the estate in the hands of the succeeding administrator; and that it is his duty to pay them as much as if they had been incurred in the course of his own administration." "It is objected by the respondent that the bar of the statute of limitations has attached to all the debts which were paid by the executor; that if he had not paid them the creditors could not sue, or require the sale of real estate to pay them. But the executor does not merely stand in the place of the creditors whose debts he has paid. There is no special statute of limitations against the allowance of an executor's account. If the payment was lawful and just when he made it, it becomes an item in his ac-

count, and as in the case of a debt due to him from his testator, is to be allowed him on settlement. Whether, after the lapse of time which bars suits against him, he shall be allowed to sell real estate to indemnify himself, depends upon the circumstances of the case." See *Wiggin v. Swett*, 6 Met. 198; *Forward v. Forward*, 6 Allen, 494, 498; *Chesson v. Chesson*, 8 Ired. Eq. 141; *Rix v. Smith*, 8 Vt. 365; *Munroe v. Holmes*, 9 Allen, 244. Where an administrator *de bonis non* pays to a former administrator a sum of money which he advanced during his administration, to satisfy a demand with which the estate was justly chargeable, he is entitled to an allowance for the sum so paid, in the settlement of his accounts. *Hearrin v. Savage*, 16 Ala. 286. It was held in *Prentice v. Dehon*, 10 Allen, 353, that one, who has been an executor of an estate and resigned his trust, cannot maintain a suit either at law or in equity against the administrator with the will annexed, to recover a debt due to him from the estate, but his remedy is to be found in the settlement of the accounts of administration in the probate court.]

(o) *Small v. Wing*, 5 Bro. P. C. 72, Toml. ed.; [*Mann v. Lawrence*, 3 Bradf. Sur. 224; *Hosack v. Rogers*, 9 Paige, 461; *Rix v. Smith*, 8 Vt. 365. If an executor, not having assets, advanced his own money to redeem land of the testator, mortgaged for less than its value, and to prevent a foreclosure, he is entitled to interest on the money advanced. *Jennison v. Hapgood*, 10 Pick. 77, 102. See *Liddel v. McVickar*, 6 Halst. 44; *Barrell v. Joy*, 16 Mass. 221;

tor on costs paid by him, pending a suit regarding the estate. (*p*) Where interest is allowed on sums carrying interest, it should be calculated from the time of a balance being struck on the general report; for until that time it cannot be ascertained that the executor had not the money in his hands. (*q*)

In *Pooley v. Ray*, (*r*) a mortgage came to an executor, who received the mortgage money and paid it away to his
Executor receiving money, to which he is not entitled, must refund, although he has paid it away to creditors. * testator's creditors. Afterwards it appeared that the mortgage had been satisfied in the testator's lifetime. And Lord Cowper held that the executor must refund, (*r*¹) although he had before paid the money away in debts, which he had not otherwise assets to pay, and that he must have his remedy against such creditors as by mistake he had paid. (*r*²) His lordship observed, that "though this might be a hard case, yet if the plaintiffs had a right to be paid their money, which they had overpaid on the mortgage, this right could not be overthrown by the defendant, the executor, applying the money in any manner he should think fit; any more than if an executor at law should recover a debt,

Hayward v. Ellis, 13 Pick. 272; *Evarts v. Nason*, 11 Vt. 122; *Callaghan v. Hall*, 1 Serg. & R. 241; *Pettingill v. Pettingill*, 60 Maine, 411, 425. But an executor who voluntarily pays debts out of his own funds, cannot claim interest on sums so paid, when he has assets in his hands at the time sufficient to pay them, which he has not chosen to convert into money. *Billingslea v. Henry*, 20 Md. 282. It seems that compound interest will never be allowed in favor of executors or administrators. *Walker's Estate*, 3 Rawle, 243, 250; *Evertson v. Tappen*, 5 John. Ch. 498, 517. But see *Storer v. Storer*, 9 Mass. 37.]

(*p*) *Gordon v. Trail*, 8 Price, 416; *Lewis v. Lewis*, 13 Beav. 82.

(*q*) 8 Price, 416.

(*r*) 1 P. Wms. 355.

(*r*¹) [See *Johnson v. Corbett*, 11 Paige, 265.]

(*r*²) [In *Walker v. Hill*, 17 Mass. 384, Jackson J. said: "At common law, a creditor cannot be compelled to refund the amount of a debt paid to him by an executor or administrator. The reason is that

the only ground on which the executor could demand the repayment, would have been a good defence against the original claim, and would have excused him from paying the debt. If he proceeds with common care and diligence he can never be compelled to pay more than has actually come to his hands, and if there is an actual deficiency of assets, the loss will fall on those creditors who are negligent in demanding their debts, or on those whose debts are postponed by law. The administrator, therefore, proceeding regularly and carefully, can never have occasion to call on a creditor to refund. This is the general rule. The only exception, if there is any exception, seems to be in the case where the executor has recovered money from a stranger and paid it out to creditors; and that money is afterwards recovered back from him, on a writ of error or other like process." See *Edgar v. Shields*, 1 Grant Cas. 361, 363, 364; *Carson v. M'Farland*, 2 Rawle, 218; *ante*, 989, note (*g*¹), 1036, note (*h*), 1909.]

and pay the testator's debts with it, and afterwards this judgment recovered by the executor is reversed in error ; the executor must restore the money to the plaintiff in error ; and his having paid it away in debts of his testator will not excuse him from paying it back. So, in the same manner, if there were a decree for the executor to be paid a sum of money by the defendant, and the executor, having received the money, pays it away in debts, and then the defendant, against whom the executor had recovered the decree, brings an appeal and reverses the decree ; the plaintiff in the appeal shall be restored to the money."

This doctrine of Lord Cowper was approved of by Lord Alvanley, in *Pickering v. Stamford*, (s) but his lordship remarked, that it would be otherwise if the defendant had delayed the appeal, and willingly stood by, while the executor paid away the money ; for that would be drawing the executor into a snare.

It may be proper in this place to mention the case of *Brown v. Spooner*. (t) There the testator gave an annuity of 50*l.* to be purchased by his executor, and, till purchased, directed him to pay the annuitant 40*l.* a year. The executor, instead of purchasing, paid 50*l.* a year from the testator's rents. And Lord Thurlow held, that although the executor * was bound to purchase the annuity immediately after the expiration of the first year from the testator's death, and therefore the court might charge him for the overpayment from the estate, yet the master, on a general reference of just allowances, could not do so. So in *Garland v. Littlewood*, (u) a case was alleged, on the pleading, to charge executors for what they might, but for their wilful default, &c. have received. At the hearing the common accounts only were directed against them. The case coming on for further directions on the master's report, Lord Langdale M. R. held that the executors could not be charged as for their wilful default, &c. and that no inquiry could then be directed on the subject, although the master's report laid a foundation for such an inquiry. (x)

What an executor may be charged with under a reference of just allowances.

(s) 2 Ves. jr. 583.

(t) 1 Ves. jr. 291.

(u) 1 Beav. 527.

(x) See, further, as to what may be deemed "just allowances," *Blackford v. Davis*, L. R. 4 Ch. App. 304 ; [*Wendell v. French*, 19 N. H. 205 ; *Tuttle v. Robinson*, 33 N. H. 104 ; *Gordon v. West*, 8 N. H.

444 ; *Jennison v. Hapgood*, 10 Pick. 77 ; *Emanuel v. Norcum*, 8 Miss. 150 (expenses incurred by an executor before he qualified) ; *Byrd v. Wells*, 40 Miss. 711 ; *Sterrett's Appeal*, 2 Penn. 419 ; *Hall v. Grovier*, 25 Mich. 428 ; *O'Neill v. Donnell*, 9 Ala. 734.]

* PART THE FIFTH.

OF REMEDIES.

BOOK THE FIRST.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS.

IN a previous part of this treatise, (*a*) there has been occasion to investigate what rights of action are comprised in the estate of an executor or administrator. It remains to consider the remedies by which those rights may be enforced in the courts of law and equity.

CHAPTER THE FIRST.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS AT LAW.

It must be observed, in the commencement of this subject, that there are some cases where an executor or administrator, although he has an interest in a *chose in action*, is not entitled to the remedy. Thus, where one of two *joint* obligees, covenantees, or partners dies, the action on the contract must be brought in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately. For example, two joint merchants appoint a person to be their factor; one dies, leaving an executor; this executor and the survivor cannot join in an action against the factor; for the remedy survives, * though not the duty; and therefore, on the recovery, the survivor must be accountable to

Instances
where the
executor
has not the
remedy.

(*a*) *Ante*, 800 *et seq.*

[1864] [1865]

the executor for that. (*b*) And the general rule is now settled, that though the right of a deceased partner devolves on his executor, (*c*) yet the *remedy* survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased. (*d*)

Again, where two have the legal interest in the performance of a contract, though the benefit be only to one of them, the remedy survives upon the death of the latter, and the executor or administrator of the deceased cannot be made a party, or sue separately. Thus, in *Anderson v. Martindale*, (*e*) there was a covenant to and with A., his executors, administrators, and assigns, and to and with B. and her assigns, to pay an annuity to A., his executors, &c. during B.'s life; and it was held that this was a joint covenant to A. and B., in which they had joint legal interest, although the benefit was for A. only; and that therefore, on the death of A. the right of action survived to B., and A.'s administrators could not sue on the covenant. (*f*)

It follows that where a contract is made jointly with several persons, and they all die, the executor or administrator of the survivor alone can sue, and the personal representatives of those who died before him cannot be joined.

* But if the interest of the covenantees be several, and one of them dies, his executor may maintain a separate action on the covenant, notwithstanding the other covenantee be living. And if the *interest* be several, it shall make no difference that the

(*b*) *Martin v. Crump*, 2 Salk. 444; S. C. 1 Ld. Raym. 340; Comb. 474.

(*c*) *Ante*, 650, 843.

(*d*) *Martin v. Crump*, 1 Ld. Raym. 340; S. C. 2 Salk. 444; Comberb. 474; *Kemp v. Andrews*, Carth. 171; S. C. 1 Show. 188; 3 Lev. 290; *Golding v. Vaughan*, 2 Chitt. Rep. 437, *per cur.*; *Rex v. Collector of Customs*, 2 M. & Sel. 225, by Dampier J.; 2 Saund. 117, note to *Coryton v. Litheby*. It appears, therefore, that the case of *Hall v. Huffam*, 2 Lev. 118; 3 Keb. 798; 1 Freem. 468, is not law. [The surviving payee or obligee is entitled to the custody of the securities, and to collect the money on them; and the representatives of the deceased co-payee or co-obligee are not at liberty to

take half of them in amount from his possession. *Lippicott v. Stokes*, 6 N. J. Eq. 122. And the executor or administrator of a deceased partner who, in good faith, allows the surviving partner to retain possession of, and to sell the joint stock in the usual course of trade, is not responsible for loss arising therefrom; but he may become chargeable with the loss of assets put into the concern by him. *Thompson v. Brown*, 4 John. Ch. 619. See *Ely v. Horine*, 5 Dana, 398.]

(*e*) 1 East, 497.

(*f*) See *Barford v. Stuckey*, 2 Brod. & Bing. 333; S. C. 5 Moore, 23; [1 Chitty Pl. (16th Am. ed.) 21, and cases in notes (*c*¹), (*c*²).]

language of the covenant is joint. Thus, in *Withers v. Bircham*, (g) by deed reciting the grant of two distinct annuities to A. and B. during the life of the grantors and the survivor, it was witnessed, that C. covenanted with A. and B. and their executors to pay the annuities, or either of them, when the grantors should make default in payment. A. died. And it was held that, the interest in the annuities being several, the covenant was also several, and that the annuity granted to A. being in arrear, his executor might maintain an action against C.

On the other hand, wherever the interest of the covenantees is joint, the rule of survivorship above stated will be enforced, although the covenant be in terms joint and several. (h)

The rule is the same with respect to remedies in form *ex delicto* as those in form *ex contractu*. Therefore, if one or more of several parties jointly interested in property, at the time an injury was committed, is dead, the action must be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately. (i)

It was not necessary, under the statute 2 Geo. 2, c. 23, for the executor or administrator of an attorney to deliver a bill of costs, for business done by his testator or intestate, before the commencement of an action, (j) that statute being confined to actions brought by the attorney himself, and not extending to his personal representatives. But the 37th *section of the stat. 6 & 7 Vict. c. 73, enacts, that no action shall be brought by any attorney or solicitor, or *by their executors, administrators, or assignees*, for the recovery of any fees, &c. until the expiration of one month after the delivery of a bill, &c.

Again, it was held that the executor of a deceased attorney or solicitor was not within the statute of Geo. 2, for any purpose; and therefore that the bill of costs delivered by the executor could not be taxed, (k) even though an action was brought upon it. (l) And further, that if the attorney or

(g) 3 B. & C. 254; S. C. 5 Dowl. & Ryl. 106.

(h) See the authorities cited in the note to *Eccleston v. Clipsham*, 1 Saund. 154. See, also, 3 B. & C. 256; and *Lane v. Drinkwater*, 1 Cr., M. & R. 599; S. C. 5 Tyrwh. 40.

(i) *Ante*, 843.

(j) *Spink v. Hare*, 1 Barnard. 343; *Wellis v. Nicholson*, Andr. 276; *Lester v. Lazarus*, 4 Dowl. 401, 402.

(k) *Maddeford v. Austwick*, 3 My. & Cr. 423; *Doe v. Sabin*, 8 Dowl. 468.

(l) *Williams v. Griffith*, 10 M. & W. 125. Where, however, the executor of the client applies, as the party chargeable by

solicitor had delivered his bill in his lifetime, and after his death it was taxed, and about a sixth part taken off, the executor was not liable to the costs of taxation. (*m*) But now by stat. 6 & 7 Vict. c. 73, s. 37, upon the application of the party chargeable with the bill delivered, the bill and the attorney's or solicitor's or his executor's or administrator's, or assignee's demand thereon, may be referred to be taxed; and if the bill, when taxed, be less by a sixth part than the bill delivered, then the attorney, his executor, administrator, or assignee, shall pay the costs. (*n*)

If there are several executors or administrators, they must all join in bringing actions, (*o*) though some be within the age of seventeen years, (*p*) or have not proved the will, (*q*) or renounced probate. (*r*) But since the court of pro-

Parties.

the attorney's bill for business done for the testator, to have it referred to taxation, he is liable to the costs, if less than a sixth is taken off. *Jefferson v. Warrington*, 7 M. & W. 137.

(*m*) *Weston v. Poole*, 2 Stra. 1056; *Willasey v. Mashiter*, 3 My. & K. 293.

(*n*) If a solicitor dies pending an order for taxation, the proceedings may be revived by the client against the solicitor's representatives by an *ex parte* order; *Re Nicholson*, 29 Beav. 665; and they may, in the same way, revive the proceeding against the client. *In re Waugh*, *Ib.* 666.

(*o*) *Bro. Exors.* 88; [*Turner v. Debell*, 2 A. K. Marsh. 383; *Hill v. Smalley*, 1 Dutcher, 374; *Judson v. Gibbons*, 5 Wend. 224. What bars one will bar the other or others. *Turner v. Debell*, *supra*. If, however, only one of several executors or administrators bring an action, either in contract or in tort, it is settled that the defendant can take advantage of the non-joinder of the co-executor or co-administrator, only by pleading in abatement that the other executor or administrator, mentioned in the probate or letters of administration, is alive and not joined in the action. 1 Chitty Pl. (16th Am. ed.) 23; *Packer v. Willson*, 15 Wend. 343; *Bodle v. Hulse*, 5 Wend. 313; *Brinckenhoff v. Wemple*, 1 Wend. 470; *Gordon v. Goodwin*, 2 Nott & McC. 70.]

(*p*) *Smith v. Smith*, Yelv. 130.

(*q*) *Brookes v. Stroud*, 1 Salk. 3; [1 Chitty Pl. (16th Am. ed.) 22, 23.]

(*r*) *Hensloe's case*, 9 Co. 37 *a*; S. P. by Lord Holt in *Wankford v. Wankford*, 1 Salk. 307; 1 Saund. 291 *l*, note to *Cabell v. Vaughan*; *Creswick v. Woodhead*, 4 M. & Gr. 811; S. C. 5 Scott N. R. 779; [*Bodle v. Hulse*, 5 Wend. 313; 1 Chitty Pl. (16th Am. ed.) 22. If two out of three executors, authorized by will to sell land, enter into a contract for that purpose, the third having renounced, an action for a breach of the contract must be brought in the names of those only by whom it was made. *Heron v. Hoffner*, 3 Rawle, 393.] If an action be brought in the name of several executors, and one or more will not join with the rest in prosecuting the suit, the court will issue a summons *ad sequendum simul*, and upon their non-appearance at the return of it, will give judgment of *severance*; viz, "*Ideo consid. est quod præd. A. sequatur solus sine ipsis T. & R. versus præd. W. de placito præd.*;" so as to enable the others to proceed without them. Wentw. Off. Ex. 212, 14th ed. And it should seem that an executor, who has been so severed, cannot sue execution if he live to judgment. *Ib.* 225. He certainly cannot acknowledge satisfaction. *Ib.*

bate *act (20 & 21 Vict. c. 77, s. 79), the law in this last respect has been altered (see *ante*, 286). (*r*¹)

Hence it follows that if one of two executors be joined as a plaintiff with a third party, the name of the latter cannot be struck out of the writ under the common law procedure act, and judgment given for the executor; for he could not maintain the action if he were sole plaintiff. (*s*)

But if one alone of several executors or administrators bring an action, either in form *ex contractu* or *ex delicto*, the defendant can only take advantage of it by pleading in abatement. (*t*) If the defendant pleads the general issue, or any other plea in bar, he is too late; he cannot then come at the fact of there being another executor. (*u*) It is not necessary in the plea in abatement, to aver that the executors, not joined as plaintiffs, have administered. (*v*)

It must be observed that if one executor of several alone sell goods of the testator, he alone may maintain an action for the price, not naming himself executor. (*x*) So if goods be taken out of the possession of one of several executors, he may sue alone to recover them. (*y*) And, generally, if one executor alone contracts on his own account alone, he **must* sue alone on such contract, notwithstanding the money recovered will be assets. (*z*)

(*r*¹) [See *Moore v. Willett*, 2 Hilton, 522. In North Carolina, only the executors who qualify by taking the necessary oaths are required to join in an action for a debt or demand due to their testator. *Alston v. Alston*, 3 Ired. (Law) 447.]

(*s*) *Stubs v. Stubs*, 1 H. & C. 257.

(*t*) 1 Saund. 291 *l*, note; *Tuckey v. Hawkins*, 4 C. B. 655; [*Hicks v. Branton*, 21 Ark. 186; *Macon &c. R. R. Co. v. Davis*, 27 Geo. 113.]

(*u*) 1 Saund. 291 *l*, note.

(*v*) See *ante*, 381, 382; Selw. N. P. 784, 6th ed., cited by Lord Tenterden, 1 Mood. & M. 363.

(*x*) Godolph. pt. 2, c. 16, s. 1; Wentw. Off. Ex. 224, 14th ed.; *Brassington v. Ault*, 2 Bing. 177; [*Aiken v. Bridgman*, 37 Vt. 249; *Laycock v. Oleson*, 60 Ill. 30.]

(*y*) Godolph. *ubi supra*; Wentw. Off. Ex. *ubi supra*.

(*z*) *Heath v. Chilton*, 12 M. & W. 632; *ante*, 881. [The rule is, that when the action is on a contract with the deceased, or for a tort to the goods before they have actually come into the executor's possession, it can be maintained by him only on the title of the deceased, and, consequently, only in a representative character; but where it is on a contract express or implied, which has sprung up, or been created since the death, or for a tort to the goods in the executor's possession, or for converting or detaining them, having escaped from his possession, or for the price of them, having been sold by him, it can be maintained by him only in his own right, and the naming himself executor will not change its nature. *Gibson C. J.* in *Kline v. Guthart*, 2 Penn. 491, 492. Such is the rule in Vermont. *Adams v. Campbell*, 4 Vt. 447.]

It is clear that two out of three co-executors may recover lands of their testator in ejectment on a joint claim. (a)

Though the plaintiff sues as executor or administrator, the writ of summons need not state his special character. (b) Process.

An executor or administrator might have arrested the defendant, in cases where a plaintiff suing in his own right might have done so. (c) Arrest. And it has already appeared, (d) that an executor might have exercised this right before probate. If the defendant was arrested by the testator, and the action abated by his death, his executors might have arrested the defendant again for the same cause of action. (e)

With respect to the affidavit of the cause of action, required by the statute (1 & 2 Vict. c. 110), it is not required, where the plaintiff sues as executor or administrator, that he should swear positively to the debt; it is sufficient that he, or the clerk of the testator or intestate, should swear that the defendant is indebted, &c. *as appears by books, &c. and as he verily believes*; though a mere reference to books, unsupported by the party's belief, is not sufficiently positive. (f) An affidavit by an executor, of a debt due to his testator, as appears by a statement made from the testator's books by an *accountant employed to investigate the same, *as deponent verily believes*, was held to be insufficient to hold a defendant to special bail. (g)

In such an affidavit it is not incorrect to allege the defendant to be indebted to the plaintiff and his wife, administratrix. (h) If the debt was to the intestate on bond, the death of the latter

(a) Doe v. Wheeler, 15 M. & W. 623.

(b) Ashworth v. Ryal, 1 B. & Ad. 19; Ilsey v. Ilsey, 2 Cr. & Jerv. 330; 1 Dowl. 310. (But see Manesty v. Stevens, 9 Bing. 400.) If the process be to answer the plaintiff as executor or administrator, the declaration ought not properly to be in his own right; and this before the abolition of bailable process by statute 1 & 2 Vict. c. 110, was held a sufficient variance for discharging the defendant out of custody; Douglas v. Irlam, 8 T. R. 416; though not where the writ described the debt to be due to the plaintiff, "executor of, &c." and not "*as executor of, &c.*" Free v. White, 1 Dowl. N. S. 586.

(c) But now by stat. 32 & 33 Vict. c. 62 (the debtors' act, 1869), arrest and imprisonment for debt have, with some exceptions, been abolished.

(d) Ante, 296.

(e) Mellin v. Evans, 1 Cr. & Jerv. 82.

(f) Sheldon v. Baker, 1 T. R. 83; Roche v. Carey, 2 W. Bl. 850; Tidd, 182, 9th ed.

(g) Rowney v. Dean, 1 Price, 402; Tidd, 182, 9th ed.

(h) Coppin v. Potter, 2 Dowl. 785; S. C. *nomine* Coppin v. Coppin, 10 Bing. 441; 4 M. & Scott, 272.

need not be alleged, nor to whom the payment was to be made. (i) But if the affidavit were entitled "Between A. B. administrator, &c. plaintiff, and C. D. defendant," it would, perhaps, be held bad, as not showing in what character the plaintiff was administrator. (j)

It was decided that executors or administrators, who held a party to bail, without reasonable or probable cause, for a debt due to the deceased, were within the statute 43 Geo. 3, c. 46, s. 3. (k)

With respect to the mode of declaring by an executor or administrator, the first inquiry is, upon what causes of action he is bound to declare in his representative character. Every action brought by an executor or administrator, where the cause of action accrues in the time of the deceased, must be brought in the *detinet* only, that is, in his representative capacity. (l) But where the cause of action accrues after the death of the testator or intestate, the executor or administrator may sue as such, or not, at his option. (m) Thus, there has already been occasion to show, (n) that, in respect * of injuries done to the goods and chattels of the testator, after his death, the executor has his option, either to sue in his representative capacity, and declare as executor or administrator, or to bring the action in his own name, and in his individual character. (n¹) So it has already appeared, with respect to contracts made with the executor or administrator in that character, that the same

(i) *Ib.*

(j) *Fletcher v. Lechmere*, 5 M. & Gr. 265.

(k) *Feely v. Reed*, 5 B. & Ald. 515, (a); *Tidd*, 984, 9th ed.

(l) 1 Saund. 112, note to *Dean of Bristol v. Guyse*; *Com. Dig. Pleader*, 2 D. 1; *Gallant v. Bouteflower*, 3 Dougl. 36, by Buller J.; [Gibson C. J. in *Kline v. Guthart*, 2 Penn. 491, 492; *Fesmire v. Brock*, 25 Ark. 20. And his declaration must show that he so sues. *Mohr v. Sherman*, 25 Ark. 7. Otherwise he will be presumed to sue in his individual right.]

(m) 3 Dougl. 36, by Buller J.; [Lawson v. Lawson, 16 Grattan, 230; *Carlisle v. Burley*, 3 Greenl. 250; *Laycock v. Oleson*, 60 Ill. 30; Gibson C. J. in *Kline v. Guthart*, 2 Penn. 491, 492; *ante*, 878,

1869, note (z); *Wylly v. King*, Geo. Decis. 7; *Merritt v. Seaman*, 6 Barb. 330; *Knox v. Bigelow*, 15 Wisc. 615. Where the debt to be recovered must be assets, the executor or administrator may sue in his representative character, though upon a contract made by himself. *Boggs v. Bard*, 2 Rawle, 102.] But an action of *assumpsit* cannot be maintained by a surviving co-executor, in his own right, against the surviving partner of a deceased co-executor, without stating himself to be such surviving co-executor. *Fitzgerald v. Boehm*, 6 Moore, 332; *ante*, 912, 913.

(n) *Ante*, 876 *et seq.*

(n¹) [*Manwell v. Briggs*, 17 Vt. 176; *Branch v. Branch*, 6 Florida, 314.]

option exists, wherever the money recovered will be assets. (o) In a modern case, (p) P. orally agreed to grant the defendant a lease for sixty years; the defendant paid part of the consideration, but P. died before the contract was carried into effect. The plaintiffs, P.'s executors, then granted the lease, which recited that P.'s agreement had been treated as void by the court of chancery, and that the lease was granted pursuant to a proposal of the plaintiffs, thereafter mentioned. The plaintiffs paid their own attorney his charges for drawing this lease. And the court of common pleas held that they were entitled to sue the defendant for money paid, and that in their own right.

In a declaration of assumpsit brought by an administrator *de bonis non*, the promise may be laid to have been made to the first administrator. (q)

(o) *Ante*, 878 *et seq.*, 880, note (d¹). See, also, *Shipman v. Thompson*, Willes, 103; [*James v. Johnson*, 44 Ala. 629; *Evans v. Gordon*, 8 Porter (Ala.), 346; *Catlin v. Underhill*, 4 McLean, 336; *Goodman v. Walker*, 30 Ala. 482; *Gunn v. Hodge*, 32 Miss. 319; *Boggs v. Bard*, 2 Rawle, 102; *Heron v. Hoffner*, 3 Rawle, 393; *Merritt v. Seaman*, 6 Barb. 330; *Aiken v. Bridgman*, 37 Vt. 249; *Kline v. Guthart*, 2 Penn. 490; *Gayle v. Ennis*, 1 Texas, 184; *McDonald v. Williams*, 16 Ark. 36; *Haskell v. Brown*, 44 Vt. 579; *Daniel v. Hollingshead*, 16 Geo. 190; 1 Chitty Pl. (16th Am. ed.) 23; *Sherburne v. Goodwin*, 44 N. H. 275; *Moulton v. Wendell*, 37 N. H. 406; *Colby v. Colby*, 2 N. H. 419; *Woodman v. Barker*, 2 N. H. 479; *Flower v. Garr*, 20 Wend. 668. A judgment recovered by an administrator is a debt due to him in his personal character, upon which suit may be brought in his own name. *Adams v. Campbell*, 4 Vt. 447. And so he may sue in debt upon it, although recovered in his representative capacity in another state. *Talmage v. Chapel*, 16 Mass. 71; *Biddle v. Wilkins*, 1 Peters (U. S.), 686; *Young v. O'Neal*, 3 Sneed, 55; *Slauter v. Chenowith*, 7 Ired. 211; *ante*, 883, note (n). And the same is true of all written contracts for debts due the estate, but in the name of the executor or administrator. *Catlin v. Un-*

derhill, 4 McLean, 337; *Lyon v. Marshall*, 11 Barb. 241. A note payable to A. B., executor of C. D., is payable to A. B. personally, the words "executor," &c. being merely descriptive; and on the death of A. B. suit may be brought on the note by the administrator of A. B. *Cravens v. Logan*, 2 Eng. 103; *West v. Chappell*, 5 Gill, 228; *Kline v. Guthart*, *supra*. Where an executor or administrator pays a debt for which the deceased was surety, he may recover the amount from the principal in an action either in his own name or in his representative capacity. *Williams v. Moore*, 9 Pick. 432; *Mowry v. Adams*, 14 Mass. 327.] An executor may bring debt in the *debet* and *detinet*, for rent on his own lease of land, although he has the lease as executor. *Holman v. Chute*, Cro. Jac. 685; Com. Dig. Pleader, 2 D. 1. So in debt for not setting out tithes, where he had the rectory as executor. *Bedel v. Sherman*, cited in *Reynell v. Langcastle*, Cro. Jac. 545; Com. Dig. Pleader, 2 D. 1.

(p) *Grissell v. Robinson*, 3 Bing. N. S. 10.

(q) *Hirst v. Smith*, 7 T. R. 182; [*Sullivan v. Holker*, 15 Mass. 374; *Dikes v. Woodhouse*, 3 Rand. 287. An administrator *de bonis non* may sue in his own name as such, on a note given to his predecessor as administrator. *Barron v.*

1. It has been lately held, that in an action by an executor, as such, where the declaration states that the defendant was *indebted to the testator* in a certain sum for work, and it appears at the trial that the work was performed by the testator under an agreement, by the terms of which he was to be paid only on the completion of his work, and that it was not completed before his death, the action must fail, notwithstanding the contract was rescinded after his death by the * consent of the plaintiff and defendant. In order to recover in such a case for the work done by the testator, the declaration, it was said, ought to have stated that the defendant was *indebted to the plaintiff*, as executor, for work done by testator. (r)

It should be observed, that if a man names himself executor or administrator, and it appears that the cause of action is in his own right, it will be no objection; for the calling himself executor is but surplusage. (s)

But it has been said that if the action be in the *debet* and *detinet*, where it should be in the *detinet* only, or *e contra*, it is substance. (t) However, it is now aided after verdict by the statute 16 & 17 Car. 2, c. 8; (u) and by the statute 5 & 6 Ann. c. 16, on a general demurrer; or after a judgment by default. (x)

The plaintiff cannot join, in the same declaration, a demand as joinder of executor or administrator, with another which accrued in counts: his own right. (x¹) And such misjoinder is a defect in

Vandvert, 13 Ala. 232; Maraman v. Trunnell, 3 Metc. (Ky.) 146; Barrus v. Boulbac, 2 Bush (Ky.), 39.]

(r) Crosthwaite v. Gardner, 18 Q. B. 640. (*Semble*, that the declaration might have been amended accordingly. 18 Q. B. 647, by Erle J.)

(s) Hornsey v. Dimocke, 1 Ventr. 119; Com. Dig. Pleader, 2 D. 1; Hargraves v. Holden, 1 Cr., M. & R. 580, note (a); [Daniels v. Richie, 7 Blackf. 391; Laycock v. Oleson, 60 Ill. 30; Allen J. in Austin v. Munro, 47 N. Y. 366, 367; Merritt v. Seamen, 2 Selden, 367. But see Hooker v. Wells, 35 Miss. 159; Burdyne v. Mackey, 7 Missou. 374.] As to rejecting the words "as executor," as surplusage, see Aspinall v. Wake, 10 Bing. 51; S. C. 3 M. & Scott, 426.

(t) Reynell v. Langcastle, Cro. Jac. 545;

Com. Dig. Pleader, 2 D. 1. But in a modern case, even a special demurrer to a declaration in debt by executors, commencing in the *debet* and *detinet*, was overruled, on the ground that this allegation might be rejected. Collett v. Collett, 3 Dowl. 211. See, also, Fergusson v. Mitchell, 4 Dowl. 513; S. C. 2 Cr., M. & R. 687.

(u) Coomber v. Watton, 1 Sid. 342; Frevin v. Paynton, 1 Lev. 251; Com. Dig. Pleader, 2 D. 1.

(x) Lee v. Pilmy, 4 Ld. Raym. 1513.

(x¹) [1 Chitty Pl. (16th Am. ed.) 226; French v. Merrill, 6 N. H. 465; Bulkley v. Andrews, 39 Conn. 523; Mason v. Norcross, Coxe, 252; Epes v. Dudley, 5 Rand. 437; Grahame v. Harris, 5 Gill & J. 489; Yates v. Kimmel, 5 Missou. 87; Jefford v. Ringgold, 6 Ala. 544; Kennedy v.

substance, and therefore bad on a general demurrer, or in arrest of judgment or in error. (*y*) Thus, if an executor takes a bond from a simple contract creditor, he cannot join a count on such bond with a count on a promise made, or debt due, to the testator; because the demand on the bond must be in * the executor's own right. (*z*) However, it is now settled, after much contrariety of cases, that if the money recovered on each of the accounts will be *assets*, the counts may be joined in the same declaration. (*a*) Therefore the same declaration which contains counts on promises to the testator may contain a count on an account stated with the plaintiff *as executor*, concerning money due to the testator from the defendant, or concerning money due to the plaintiff *as executor*, (*b*) or a count for money lent by the plaintiff *as executor*, (*c*) or a count for money had and received by the defendant to the use of the plaintiff *as executor*, (*d*) or a count for money paid by the plaintiff *as executor* to the use of the defendant, (*e*) or a count for goods sold and delivered by the plaintiff *as executor*, (*f*) or a count for materials found, and for work and labor done, by the plaintiff *as executor*, (*g*) or a count * on a bill of exchange in-

Stallworth, 18 Ala. 368; Brown v. Webber, 5 Cush. 560; Cassels v. Vernon, 5 Mason, 332; Godbold v. Roberts, 20 Ala. 354; McDaniel v. Parks, 19 Ark. 671; Frink v. Taylor, 4 Green (Iowa), 196; Moody v. Ewing, 8 B. Mon. 521; Pugsley v. Aiken, 14 Barb. 114; Lucas v. New York &c. R. R. Co. 24 Barb. 245; Seip v. Drach, 14 Penn. St. 352; Bogle v. Kreitzer, 46 Penn. St. 465; Robbins v. Gillett, 2 Chand. Wis. 96.]

(*y*) 2 Saund. 117 *e*, note to Coryton v. Lithebye, Tidd, 12, 9th ed.

(*z*) Hosier v. Lord Arundell, 3 Bos. & Pull. 7; Partridge v. Court, 5 Price, 419, 420, 421; *ante*, 882; [Myer v. Cole, 12 John. 349; Demott v. Field, 7 Cowen, 58; Reynolds v. Reynolds, 8 Wend. 244; Gillet v. Hutchinson, 24 Wend. 184.]

(*a*) 2 Saund. 117 *g*, note to Coryton v. Lithebye; Gallant v. Bouteflower, 3 Dougl. 34; [Fry v. Evans, 8 Wend. 530; Sullivan v. Holker, 15 Mass. 374; Sebring v. Keith, 2 Bailey (S. Car.), 192.]

(*b*) Needham v. Corke, 1 Freem. 538;

Thompson v. Stent, 1 Taunt. 322; Cowell v. Watts, 6 East, 405; *ante*, 878.

(*c*) Webster v. Spencer, 3 B. & Ald. 365; Gallant v. Bouteflower, 3 Dougl. 34.

(*d*) Foxwist v. Tremaine, 2 Saund. 208; Petrie v. Hannay, 3 T. R. 659; Gallant v. Bouteflower, 3 Dougl. 34; Smith v. Barrow, 2 T. R. 477, by Ashurst J.; Webster v. Spencer, 3 B. & Ald. 364; Clark v. Hougham, 2 B. & C. 149; Dowbiggen v. Harrison, 9 B. & C. 669, by Lord Tenterden; [Patterson v. Patterson, 59 N. Y. 574, 582;] *ante*, 879.

(*e*) Ord v. Fenwick, 3 East, 103; *ante*, 879.

(*f*) Cowell v. Watts, East, 405; S. C. 2 Smith, 410; Dowbiggen v. Harrison, 9 B. & C. 669, by Lord Tenterden; *ante*, 879.

(*g*) Marshall v. Broadhurst, 1 Cr. & Jerv. 403; S. C. 1 Tyrwh. 308; Edwards v. Grace, 2 M. & W. 190; *ante*, 879. In Bolingbroke v. Kerr, L. R. 1 Ex. 222, it was held that an administrator cannot sue in his representative character on contracts made after the testator's death

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dorsed to the plaintiff *as executor*, (*h*) or on a promissory note made to him *as executor*. (*i*) So in a declaration in debt, a count on a judgment recovered by the plaintiff *as executor*, may be joined with counts on debts which accrued to the testator. (*j*)

But it must be stated in the count that the duty accrued to the plaintiff in his representative character of executor. It is not enough to say that it accrued to him, "executor," or "being executor:" it must be averred that it accrued to him "*as executor*." (*j*¹) And, therefore, where a count, upon an account stated with the plaintiff *executrix* (not saying *as executrix*), was joined with a count on a promise to the testator, it was held, in error, after judgment by *nil dicit*, and a writ of inquiry and final judgment, that those two counts could not be joined. (*k*) However, in a modern case in the house of lords, (*l*) in a declaration by executors, a count stating that the defendant had accounted with the plaintiffs, "executors as aforesaid," was joined with counts stating promises to the testator. After a verdict and judgment for the

in the carrying on of the testator's business. But this decision must not be taken to interfere with the established rule, that wherever the money recovered will be assets, the executor may sue for it, and declare in his representative character. See *ante*, 881. See, also, *Abbott v. Parfitt*, L. R. 6 Q. B. 346; *Moseley v. Randell*, L. R. 6 Q. B. 336.

(*h*) *King v. Thom*, 1 T. R. 487; *Catherwood v. Chabaud*, 1 B. & C. 150; *ante*, 880. See, also, *Murray v. E. I. Company*, 5 B. & Ald. 204; *ante*, 882.

(*i*) *Partridge v. Court*, 5 Price, 412; S. C. affirmed on error, 7 Price, 591; *ante*, 880; [1 Chitty Pl. (16th Am. ed.) 225, 226; *Hapgood v. Houghton*, 10 Pick. 154; *Stevens v. Gregg*, 10 Serg. & R. 234; *Sebring v. Keith*, 2 Bailey, 192; *Peries v. Aycinena*, 3 Watts & S. 64; *Lowe v. Bowman*, 5 Blackf. 410; *Lea v. Hopkins*, 7 Penn. St. 385; *Boyle v. Townes*, 9 Leigh, 158; *Sullivan v. Holker*, 15 Mass. 374; *Clark v. Lamb*, 6 Pick. 512; *Fry v. Evans*, 8 Wend. 530; *Bank of Pennsylvania v. Haldiman*, 3 Penn. 161; *Hemphill v. Hamilton*, 6 Eng. 425.]

(*j*) *Crawford v. Whittall*, 1 Dougl. 4, note (1); *ante*, 878, note (*o*); [*Stevens v. Gregg*, 10 Serg. & R. 234; *Malin v. Bull*, 13 Serg. & R. 441; *Bank of Pennsylvania v. Haldiman*, 1 Penn. 161; *Lashley v. Wiley*, 8 Humph. 659; *Robbins v. Gillett*, 2 Chand. (Wis.) 96.] So an executor may in the same declaration declare for rent due in his own time, and for that which accrued in the testator's time. *Taylor v. Holmes*, 1 Freem. 367.

(*j*¹) [See *Hemphill v. Hamilton*, 11 Ark. 425; *Sabin v. Hamilton*, 2 Ark. 485; *Williams v. Moore*, 32 Ala. 506; *Ikelheimer v. Chapman*, 32 Ala. 676; *Sherman v. Christian*, 6 Rand. 49; *Allen J. in Austin v. Munro*, 47 N. Y. 367.]

(*k*) *Henshall v. Roberts*, 5 East, 150; 2 Saund. 117 *h*, note; *Tidd*, 13, 9th ed.; *Webb v. Cowdell*, 14 M. & W. 820; *Davies v. Davies*, 1 H. & N. 451. And this misjoinder is not cured by the common law procedure act (1852).

(*l*) *Lancefield v. Allen*, 1 Bligh N. S. 592.

plaintiffs, a writ of error was brought upon the ground of the misjoinder. But the judgment was affirmed with costs.

It is plainly a misjoinder of plaintiffs where an executor or administrator sues on the common money counts jointly with another plaintiff, and such misjoinder is not cured by the common law procedure act (1860), s. 19. (*m*)

Misjoinder of plaintiffs.

* It was formerly necessary for an executor when he declared as such, to make a *profert in curia* of the letters testamentary; and for an administrator to make a *profert* of the letters of administration with a statement of the grant of the latter. (*m*¹) But by the common law procedure act (1852), s. 55, "It shall not be necessary to make *profert* of any deed or other document relied on in any pleading, and if *profert* shall be made, it shall not entitle the opposite party to crave oyer, or set out upon oyer such deed or other document."

Profert of letters of administration or probate unnecessary since the common law procedure act:

oyer abolished:

Before the law was thus altered, if an executor, declaring as such, made *profert* of the letters testamentary, not having, in fact, at that time obtained probate, the defendant, in order to raise the objection, must have demanded oyer; (*m*²) for if he had pleaded that the plaintiff never was nor is executor in manner and form as alleged in the declaration, the plaintiff would have succeeded on this issue, if he had obtained probate at any time before the trial; (*n*) but by demanding oyer, the defendant made it impossible for the plaintiff to proceed, till he could produce the probate.

(*m*) *Bellingham v. Clark*, 1 B. & S. 332.

(*m*¹) [Shaw C. J. in *Rand v. Hubbard*, 4 Met. 25; *Matherson v. Grant*, 2 How. 263; *Daws v. Taylor*, 4 Jones (Law), 499; *Fugate v. Bronaugh*, 3 Cranch C. C. 65; *Carr v. Wyley*, 23 Ala. 821; *Cocke v. Walters*, 6 Ark. 404; *Lindu v. Monroe*, 33 Ill. 388; *Ligon v. Bishop*, 43 Miss. 527. Profert is not necessary where the cause of action accrued after the death of the testator or intestate. *Anderson v. Wilson*, 13 Ark. 409; *Caller v. Dade*, Minor (Ala.), 20; *Harbin v. Levi*, 6 Ala. 399; *Knott v. Clements*, 13 Ark. 335; *Savage v. Merriman*, 1 Blackf. 176; *Thames v. Richardson*, 3 Strobb. 484. *In *Langdon v. Potter*, 11 Mass. 313, 314, Jackson J.

said: "It will be recollected, that a declaration by an administrator in our courts does not make *profert* of the letters of administration, nor set forth where, or by what authority the administration was granted." So in Rhode Island, *Elles v. Appleby*, 4 R. I. 462. As to Pennsylvania, see *Axers v. Musselman*, 2 Browne, 115; *McDonald v. Browning*, 4 Phil. (Penn.) 21. As to Georgia, see *Beale v. Hall*, 22 Geo. 431. As to Indiana, *Wyant v. Wyant*, 38 Ind. 48.]

(*m*²) [See *Cocke v. Walters*, 1 Eng. (Ark.) 404; *Collins v. Ayers*, 13 Ill. 358; *Campbell v. Baldwin*, 6 Blackf. 364.]

(*n*) *Thompson v. Reynolds*, 3 C. & P. 123. See *ante*, 304.

The alteration of the law as to *profert* and *oyer*, has rendered this course impracticable ; and it may place a debtor to the deceased in a situation of some hardship and difficulty, if he is sued for the debt by one assuming to be the executor of the creditor, but who has not proved the will. For if the debtor pays the debt into court, he may be paying it to one who perhaps may never acquire a title to it by obtaining probate, and so be forced to pay it over again. On the other hand, if he pleads *ne unques executor*, and goes to trial of an issue joined on that plea, and the plaintiff has obtained probate in the mean time, it will, by relation, sustain the plaintiff's title to maintain the action, and the debtor will have to pay all the costs of the suit ; though he has never disputed the debt and always been willing to pay it, if he could ascertain the person who was authorized to receive it. * In order, therefore, to protect a defendant under such circumstances, the court, on its being shown that the plaintiff, who has declared as executor, has not obtained probate, will stay proceedings until probate shall have been taken out and a reasonable time has elapsed after it shall have been submitted to the inspection of the defendant. (o)

By stat. 2 Geo. 2, c. 22, s. 13, where either party sues or is sued
 Pleas. as executor or administrator, where there are mutual debts
 between the testator or intestate and either party, one
 Set-off: debt may be set against the other. (o¹) But in an action

(o) Webb v. Adkins, 14 C. B. 401.

(o¹) [Jarvis v. Rogers, 15 Mass. 389, 407 ; Knapp v. Lee, 3 Pick. 452, 460 ; Boardman v. Smith, 4 Pick. 212, 215 ; M'Donald v. Webster, 2 Mass. 498 ; Richardson v. Parker, 2 Swan, 529 ; Bigelow v. Folger, 2 Met. 255 ; Granger v. Granger, 6 Ohio, 25 ; Ray v. Dennis, 5 Geo. 357 ; Peacock v. Haven, 22 Ill. 23 ; Smalley v. Trammel, 11 Texas, 10 ; Mitchell v. Rucker, 22 Texas, 66. In Mathewson v. Strafford Bank, 45 N. H. 104, it was held that a claim against the estate of a deceased person, who was indorser of a note not paid at maturity, may be set off against a claim for money had and received before his decease, though the note did not become payable, and notice of the non-payment was not given, till after the decease. In this case Bell C. J. notes a difference between the English statute and

the statutes of New Hampshire and Massachusetts : " Our statute, on this subject," he says, " is, so far as we perceive, substantially the same as the statute of Geo. 2, c. 22, except that it uses the words '*debts or demands*' instead of the single word '*debts*.' Our statute does not confine the set-off to debts, but provides that demands, that is, claims which are not debts, may be set off ; and though the language has been confined in practice to demands capable of being ascertained by computation (Drew v. Towle, 27 N. H. 412), it seems to be designed to reach such a case as the present, and the construction, which finds a set-off in such case, is necessary to give reasonable effect to the statute of set-off." By the statute of Massachusetts it is provided that " in actions by executors and administrators, demands against their testators or intestates which

by an executor in his own name to recover money due to the testator in his lifetime and received by the defendant after his death,

belonged to the defendant at the time of their death, may be set off in the same manner as if the action had been brought by the deceased." Genl. Sts. Mass. c. 130, § 12. It was held in *Bigelow v. Folger*, 2 Met. 255, that a set-off was allowed, although the note proposed to be set off was not due, at the commencement of the action, but became due afterwards. Shaw C. J. in this case said: "In the present case, it is not necessary to decide that in all cases a debt not yet due may be set off in a suit brought by the administrator of an insolvent estate, though we think the authorities go to that extent. *Sewall v. Sparrow*, 16 Mass. 26." But see, as to New York, *Mercien v. Smith*, 2 Hill, 210; and as to Wisconsin, *Armstrong v. Pratt*, 2 Wis. 299; and as to Virginia, *Minor v. Minor*, 8 Grattan, 1. In *Rawson v. Cope-land*, 3 Barb. Ch. 166, it was held that, in order to entitle a defendant to a set-off against an executor or administrator, it is not necessary that the defendant's debt should have been actually due or really liquidated, at the death of the testator or intestate, provided it has become due and payable at the time the suit is brought against him by the executor or administrator, so that, if the decedent had lived, and had brought the suit himself at the time, the demand would have been a proper subject of set-off. And so in a suit by the executor or administrator of an estate that is represented to be insolvent, the defendant may set-off claims against the deceased which are for sums not liquidated and which cannot be ascertained by calculation, and are therefore not the subject of set-off under the general statute of set-off, and such claims may be set off, although they have been disallowed by the commissioners appointed to examine the claims of creditors against the deceased, and the claimant has not appealed from their decision. *Phelps v. Rice*, 10 Met. 128. Hubbard J. said: "The demand sued in this case being that

of an administrator of an insolvent estate, the right of set-off is not limited to cases provided for by the statute of set-off. It extends to all cases where mutual demands exist which survive the death of the party; and a defendant, therefore, when sued, may set up in defence claims not liquidated, as well as those the amount of which is ascertained. This is the principle established in *M'Donald v. Webster*, 2 Mass. 498, and which has repeatedly received the sanction of this court. *Jarvis v. Rogers*, 15 Mass. 407; *Knapp v. Lee*, 3 Pick. 460; *Bigelow v. Folger*, 2 Met. 255." *Bordman v. Smith*, 4 Pick. 212, 215. "When an estate is represented insolvent, all mutual demands of every nature and kind are to be set off, and the balance only is the debt due from the estate, or to the estate, as it may be found. This does not stand upon the law regulating set-off generally, but on the law respecting the settlement of insolvent estates." Shaw C. J. in *Bigelow v. Folger*, 2 Met. 256. So in Maine, in *Morrison v. Jewell*, 34 Maine, 146, 147, 148, Shepley C. J. said: "Where one has deceased and his estate has been represented to be insolvent, all existing claims are to be set off and a final balance is to be ascertained;" although "no set-off of such claims could have been allowed, if both parties had been alive." See, also, *Medomak Bank v. Curtis*, 24 Maine, 36; *Mathewson v. Strafford Bank*, 45 N. H. 104, 110; *Aldrich v. Campbell*, 4 Gray, 284, 286. But in Pennsylvania it was held in *Bosler v. Exchange Bank*, that in suits by or against executors or administrators, when the estate is notoriously insolvent, a debt not due at the time of the death of the testator or intestate, cannot be set off, although it became due before the commencement of the suit. In an action by an executor or administrator on a demand due the estate of the deceased, the defendant cannot set-off a claim barred by the special statute of limitations in favor

the defendant cannot set-off a debt due to him from the testator. (*p*) And the same rule holds where the plaintiff declares, *as executor*, for a debt due after the death of the testator. (*q*) Again, if a stranger received rent due to the testator in his lifetime, and afterwards, by desire of the tenant in possession, pays the demand of ground rent, due at the same time, for the same premises, he may deduct such payment in an action by the executor for the

of executors and administrators. *Lovell v. Nelson*, 11 Allen, 101; *Jones v. Jones*, 21 N. H. 219, 222. See *Cunningham v. Baker*, 2 Nott & McC. 399; *Bell v. Andrews*, 34 Ala. 538.]

(*p*) *Shipman v. Thompson*, Willes, 103; *Tegetmeyer v. Lumley*, 25 Geo. 3, B. R. reported in Durnford's note to *Hutchinson v. Sturges*, Willes, 264; [*Newhall v. Turney*, 14 Ill. 338; *Woodward v. McGaugh*, 8 Misson. 161; *Aiken v. Bridgman*, 37 Vt. 249.] So it was held, by Romilly M. R., that where a creditor had purchased part of the intestate's goods from his administrator, he could not set off the price against a debt due to him from the intestate at his decease. *Lambarde v. Older*, 17 Beav. 542; *Wrout v. Dawes*, 25 Beav. 369; [*Hall v. Hall*, 11 Texas, 526; *Steel v. Steel*, 12 Penn. St. 64; *Mellen v. Boarman*, 13 Sm. & M. 100; *Cotton v. Parker*, 1 Sm. & M. Ch. 191. So in an action by an executor or administrator of an insolvent estate for a debt due to the deceased, the defendant cannot set off a debt due from the deceased, purchased by the defendant after the death. *Root v. Taylor*, 20 John. 137; *Whitehead v. Cade*, 2 Miss. 95; *Dwight v. Carson*, 2 La. Ann. 459; *Irons v. Irons*, 5 R. I. 264; *Happoldt v. Jones*, Harper, 109; *Schmidt v. Crafts*, 2 Brev. 266. See *Aldrich v. Campbell*, 4 Gray, 284; *McGinnis v. Allen*, 2 Swan, 645; *Smith v. Boyer*, 2 Watts, 173. Distributees cannot, generally, in a suit by an administrator, set up by way of set-off the distributive share to which, on final settlement, they may be entitled. *Guthrie v. Guthrie*, 17 Texas, 541. So in an action by an executor, a legacy bequeathed to the defendant cannot be set

off though the executor has assets to pay the legacy. *Robinson v. Robinson*, 4 Harr. 418.] As to set-off in an action brought by husband and wife in right of the wife as executrix, see *Field v. Allen*, 9 M. & W. 694.

(*q*) *Kilvington v. Stevenson*, cited by Erskine from Yates's MS. in *Tegetmeyer v. Lumley*, *ubi supra*; *Schofield v. Corbett*, 11 Q. B. 779; S. C. 6 Nev. & M. 627; *Rees v. Watts*, 11 Ex. 410; *Watts v. Rees*, 9 Ex. 696, overruling *Mardell v. Thelluson*, 18 Q. B. 857; [*Patterson v. Patterson*, 59 N. Y. 574.] See, also, 6 El. & Bl. 976; *post*, pt. v. bk. II. ch. I.; [*Wolfsberger v. Bucher*, 10 Serg. & R. 11; *Dayhuff v. Dayhuff*, 27 Ind. 158; *Colby v. Colby*, 2 N. H. 419; *Shaw v. Gookin*, 7 N. H. 16; *Bizzell v. Stone*, 12 Ark. 378; *Cook v. Lovell*, 11 Iowa, 81; *Rapier v. Holland*, Minor (Ala.), 176; *Brown v. Garland*, 1 Wash. (Va.) 217; *Burton v. Chim*, Hardin (Ky.), 252; *Fry v. Evans*, 8 Wend. 530; *Mills v. Lumpkin*, 1 Geo. 511; *Crawford v. Beal*, Dudley (Geo.), 204; *Merritt v. Scaman*, 6 N. Y. 168; *Stuart v. Commonwealth*, 8 Watts, 74. In an action by an administrator to recover a debt due to the intestate, the defendant was allowed to file in set-off a demand for money paid by him to defray the funeral expenses of the deceased, in *Adams v. Butts*, 16 Pick. 343. But, as a general rule, in an action by an executor or administrator the defendant cannot plead in set-off any demand against the estate which accrued to him since the death of the deceased. *Atchison v. Smith*, 25 Texas, 228; *Minor v. Minor*, 8 Grattan, 1.]

rents received ; but he cannot deduct a payment of ground rent arising after the death of the testator. (*r*)

In *Henderson v. Henderson*, (*s*) an action was brought on * a decree on the equity side of the supreme court of Newfoundland, awarding a sum of money to be paid by the defendant to the plaintiff ; and the defendant, by his plea, after alleging that the plaintiff had sued in the supreme court, as the representative of a deceased person, proceeded to rely on a set-off for debts due from the deceased, or his estate, to the defendant. And it was held that this plea was bad ; because the plaintiff was now suing in his own right, and the defence, if available at all, was one which ought to have been made in the supreme court.

There is no right, either at law or in equity, to deduct a loss on a policy, underwritten by a testator with a broker, from the amount due to the executors for premiums from the same broker. (*t*)

It should seem that, under this statute, an equitable demand cannot be set off at law. In *Tucker v. Tucker*, (*u*) one Sarah Tucker, in the year 1791, gave a bond to William Tucker, conditioned for the payment of money. William Tucker made one Charlotte Tucker his executrix and residuary legatee. She proved the will, and assented to the bequest to herself, and died, not having fully administered, making the defendant her executrix. A sum due on this bond remained unpaid. Charlotte Tucker, in the year 1774, in consideration of a marriage about to take place between herself and the father of Sarah Tucker, had given a bond to a trustee, conditioned for payment of a sum of money to the use of Sarah Tucker, if she, Charlotte Tucker (then Charlotte Small), should marry, and survive her intended husband. She did marry, and survived him, and the money not having been paid in her lifetime, the trustee's executor sued the defendant as her executrix on that bond. And the court of king's bench held, that in this action the claim of the defendant upon Sarah Tucker's bond could not be set off.

* Where an equitable set-off exists, the proper course is to apply to a court of equity for an injunction. (*v*) And although the rule

(*r*) *Wilkinson v. Cawood*, 3 Anstr. 905.

(*s*) 6 Q. B. 288.

(*t*) *Beckwith v. Bullen*, 8 El. & Bl. 683.

(*u*) 4 B. & Ad. 745 ; S. C. 1 Nev. & M.

(*v*) *I. e.* unless it can be pleaded by way of equitable defence under the common law procedure act, 1854, sect. 83.

is as fully established in equity as at law, that demands due in different rights cannot be set off, — the principle being, that one's money shall not be applied to pay another man's debts, — yet a court of equity will have regard to the beneficial ownership of the debts, and will give effect to the right of set-off accordingly, notwithstanding any technical difficulties as to forms of action or the like. Thus, in *Jones v. Mossop*, (x) A. was indebted on bond to B.; B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate. The estate of B., after all debts, &c. were paid, left a clear residue exceeding the amount of the bond debt. A. became surety for C. by joining in promissory notes. C. became an insolvent debtor, and A. was compelled to pay the notes. C. died, and then the assignee under his insolvency took out letters of administration *de bonis non* of B., and sued A. on the bond. It was held that A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt. (y)

In *Bridges v. Smyth*, (z) the court of common pleas held that a judgment for the plaintiff in that court might be set off against a judgment for the defendant in the king's bench, although the plaintiff was dead and the judgment was assets in the hands of her administrator. In that case, Mrs. Brydges had judgment against Miss Smyth in the common pleas, in two actions, to the amount of 816*l.* 15*s.*; and Mrs. Brydges dying after the judgments were entered up, Frowd, her attorney, * who claimed to be a judgment creditor, had taken out letters of administration. Miss Smyth had a judgment in the king's bench to the amount of 3,052*l.* against Mrs. Brydges, and Frowd was requested to set off the 816*l.* 15*s.* against the 3,052*l.* This he refused to do, on the ground that, she being dead, and he being her administrator, the judgments in the common pleas were in a different right, and could not be set off, without compromising the interest of the creditors. But the court of common pleas ordered satisfaction to be entered on the judgment rolls in that court, upon acknowl-

(x) 3 Hare, 568. See, also, *Baillie v. Edwards*, 2 H. L. Cas. 74.

(y) It must not, however, be understood that the mere existence of cross-demands is sufficient to constitute an equitable set-off as contradistinguished from the set-off at law. It will be found that this equita-

ble set-off exists in cases where the party seeking the benefit of it can show some equitable grounds for being protected against his adversary's demand. *Rawson v. Samuel*, 1 Cr. & Ph. 161, 178.

(z) 8 Bing. 29.

edging satisfaction for 816*l.* 15*s.* on the judgment for 3,052*l.* in the king's bench.

In answer to a set-off, the executor or administrator may give in evidence the advance of money by him *as executor* or administrator to the defendant. (a)

If, in *assumpsit* by an executor, in which all the promises are laid to be made *to the testator* in his lifetime, the defendant pleads that he did not promise within six years ^{plea of statute of limitations.} next before the obtaining of the original writ of the plaintiff, and the plaintiff replies that the original was sued on such a day, and that within six years before the day of obtaining thereof, that is to say, on such a day, letters testamentary were granted to him, by which the plaintiff's action accrued to him within six years; this replication is bad; because the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the will; for that gave no new cause of action, and therefore the time of proving the will is perfectly immaterial. (b)

But where to an action by an administrator for money had and received to his use by the defendant, who had received the intestate's money *after his death*, six years and upwards before the commencement of the action, but within six years after letters of administration granted to the *plaintiff, the defendant pleaded the statute of limitations, and the plaintiff replied the special matter above mentioned; it was held, upon demurrer, that the statute was no bar, because this was not a cause of action in the intestate, the money having been received after his death, and the plaintiff's title commenced by taking out letters of administration, before which time no cause of action accrued to him. (c) So where an action was brought by an administrator against the acceptors of

(a) *Gallant v. Bouteflower*, 3 Dougl. 34.

(b) *Hickman v. Walker*, Willes, 27; 2 Saund. 63 *k*, note to *Hodsden v. Harridge*; [Warren *v. Paff*, 4 Bradf. Sur. 260. See *Conant v. Hitt*, 12 Vt. 285; *Hapgood v. Southgate*, 21 Vt. 584.]

(c) *Cary v. Stephenson*, 2 Salk. 421; S. C. Carth. 335; Skinn. 555; 4 Mod. 372. See *Stanford's case*, cited Cro. Jac. 61; [Dunning *v. Ocean National Bank*, 6 Lansing, 296; *Fergusson v. Fyffe*, 8 Cl. & Fin. 121. This rule has been generally

recognized in the United States. In New York, *Bucklin v. Ford*, 5 Barb. 393; Pennsylvania, *Johnston v. Humphries*, 14 Serg. & R. 395; Maryland, *Fishwick v. Sewall*, 4 Harr. & J. 393, 428; North Carolina, *Grubb v. Clayton*, 2 Hayw. 378; *Lee v. Gause*, 2 Ired. 448; *Jones v. Brodie*, 3 Monr. 354; South Carolina, *Gieger v. Brown*, 4 McCord, 423; *Webb v. Elmore*, 2 Bailey, 595; Virginia, *Hansford v. Elliott*, 9 Leigh, 79.]

bills of exchange payable to the intestate, and accepted after his death, but before the grant of letters of administration, it was held that the statute ran only from the grant of the letters. (*d*)

It must be observed, that where, in *assumpsit* by an executor, on a contract made with *his testator*, all the promises in the declaration are laid to be made to the testator, and the defendant pleads the statute of limitations, the plaintiff cannot in his replication set forth a promise made to *himself* within six years, without being guilty of a departure, any more than he can in such case give evidence of a promise made to himself within six years upon an issue joined on the plea of the statute of limitations. (*e*) However, in *Heylin v. Hastings*, (*f*) it is said to have been admitted, that a promise made to an executor is sufficient to prove the issue of *assumpsit* to the testator within six years; because the promise does not give any new cause of action, but only revives the old cause, and is of no other use but to prevent the bar by

(*d*) *Murray v. E. I. Company*, 5 B. & Ald. 204. See, also, *ante*, 630; *Pratt v. Swaine*, 8 B. & C. 285; S. C. 1 Mann. & Ryl. 351; *Perry v. Jenkins*, 1 My. & Cr. 118. [In Massachusetts, if a person entitled to bring or liable to any action dies before the time limited for the commencement of such action, or within thirty days after the expiration of said time, and the cause of action by law survives, the action may be commenced by or against the executor or administrator of the deceased person, at any time within two years after the grant of letters testamentary or of administration, and not afterwards if otherwise barred. Genl. Sts. Mass. c. 155, § 10. See, as to the force of the expression "otherwise barred," *Corliss Steam Engine Co. v. Schumacher*, 109 Mass. 416, 418. Under this statute it was held that an action brought by one who is appointed, in Massachusetts, administrator of the estate of an inhabitant of another state, within twenty years from the death of such inhabitant, is not barred by the statute of limitations, if it is commenced within two years after the first appointment of such administrator. *Gallup v. Gallup*, 11 Met. 445. See *M'Kinder v. Littlejohn*, 1 Ired. (Law) 66; *Brewster v. Brewster*, 52 N. H.

52; *post*, 1951, note (*p*). And so it was held that under it the *donee causa mortis* of a negotiable note not indorsed, may bring an action thereon in the name of the administrator of the donor, at any time within two years after the grant of letters of administration. *Bates v. Kempton*, 7 Gray, 382. This provision of the statute, however, does not apply to the case of a creditor of an insolvent estate, for the reason that such creditor cannot bring an action, but is only entitled to file his claim before the commissioner, within the time allowed by law. *Ostrom v. Curtis*, 1 Cush. 467. By the code of procedure, in New York, on the death of a party entitled to bring an action, where the cause of action survives, the time within which the action may be brought by his representatives is extended for the term of one year from the date of the death of the party, in addition to the time limited by the statute of limitations. Code of Pro. § 102.]

(*e*) *Hickman v. Walker*, Willes, 29; *Dean v. Crane*, 1 Salk. 28; S. C. 6 Mod. 309, 310; *Executors of the Duke of Marlborough v. Widmore*, 2 Stra. 890; 2 Saund. 631; [1 Chitty Pl. (16th Am. ed.) 675.]

(*f*) *Carth.* 471.

the statute of limitations. But this seems not to be well founded ; and it has since been determined, that evidence of an acknowledgment by the defendant within six years of an old existing debt, of above six * years' standing, due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate. (g) Therefore, where it is necessary to rely on an acknowledgment, made since the death of the testator, to bar the statute, counts must be inserted in the declaration, laying promises to the plaintiff as executor. (h)

Accordingly, if an executor brings an action on a bill or note, and intends to rely on an acknowledgment or promise made to himself in order to bar the statute, he must, in his declaration, state the making of the bill or note, and then proceed to aver that after the death of his testator or intestate, the defendant promised him (the plaintiff) as executor or administrator, to pay him. And where the declaration is so framed, such promise may be denied by a plea of *non-assumpsit*, notwithstanding the rule of pleading, H. T. 1852, r. 7, that in all actions upon bills of exchange and promissory notes, the plea of *non-assumpsit* shall be inadmissible. For the mere production and proof of the note would not prove the promise as made *to the executors*, as it would if the promise were laid as made *to the testators*. The right of action indeed is transferred to the executor, but no promise is implied by law to pay him ; otherwise the statute of limitations would run from the death of the payee, and not from the time of the note becoming due. In order, therefore, to support the action, there must be an express promise to the executor, that is to say, an express promise as contradistinguished from a promise contained in the note itself, or anything implied out of it ; and the cause of action is the existence of the note, *with* the express promise to the executor to pay the amount of it ; whereas the rule is confined * to cases where the action is *only* on the note. (i) The effect of

(g) *Sarell v. Wine*, 3 East, 409 ; S. P. *Ward v. Hunter*, 6 Taunt. 210 ; S. P. by Bayley J. in *Short v. M'Carthy*, 3 B. & Ald. 631 ; [*Jones v. Moore*, 5 Binney, 573. But in New Hampshire and Massachusetts the practice has always been otherwise. See *Buswell v. Roby*, 3 N. H. 467, 468 ; *Baxter v. Penniman*, 8 Mass. 134.]

(h) As to what is sufficient evidence of an account stated with the plaintiff as executor, see *Purdon v. Purdon*, 10 M. & W. 562.

(i) *Timmis v. Platt*, 2 M. & W. 720 ; *Gilbert v. Platt*, 5 Dowl. 748 ; *Rolleston v. Dixon*, 2 Dowl. & L. 892 ; *post*, pt. v. bk. II. ch. I.

the plea of *non-assumpsit* in such a case is, to admit that the bill or note was signed by the defendant, but to deny that he made any promise to the executor.

In *Clark v. Hooper*, (*j*) payment of interest on a promissory note to an administrator, who had omitted to take out administration in the diocese in which the note was a *bonum notabile*, was held a sufficient acknowledgment of the debt to bar the statute.

If an executor takes out proper process in *assumpsit*, within a year after the death of his testator, the six years not being elapsed before, though they expire within that period, yet, it has been said, that will be sufficient to take the case out of the statute. (*k*) But the contrary was lately ruled in *Penny v. Brice*. (*l*)

Where a plaintiff dies, a writ by journeys accounts cannot be brought by his executor. (*m*) It was, indeed, ruled * in *Estob v. Thorowgood*, (*n*) that a general executor might bring a writ by journeys accounts upon a writ brought by the executor *durante minore ætate*, although it was otherwise in the case of a writ brought by an administrator *durante minore ætate*. But in *Kinsey v. Heyward*, (*o*) Treby C. J. said, that although he concurred in that opinion on the former occasion, he was never ashamed to retract his opinion, when convinced upon better reason; and he, therefore, now declared that he thought that the executor could in neither case have the writ; because in no case can a writ of

(*j*) 10 Bing. 840; 4 M. & Scott, 353. [See *Baxter v. Penniman*, 8 Mass. 133; *Johnson v. Beardslee*, 15 John. 3; *Martin v. Williams*, 17 John. 330.]

(*k*) Tidd, 28, 9th ed., citing *Cawer v. James*, Bull. N. P. 150. But see S. C. reported in Willes, 255, *nomine* *Karver v. James*.

(*l*) 18 C. B. N. S. 393.

(*m*) *Kinsey v. Heyward*, 1 Ld. Raym. 432. If a writ abates, without the default of the plaintiff, he may have a new writ by journeys accounts, i. e. *per dietas computatas*. The word *dieta* means a day's journey; and the origin of the expression is said to be, that the court of chancery, being a movable court, and following the king's court, and the writs being to be purchased out of chancery, the party was bound to apply to the king's court as hastily as the distance of the place would

allow, accounting twenty miles for every day's journey; and, for this reason, he was to show that he had purchased it as hastily as possible, accounting the days' journeys he had to the court. 1 Ld. Raym. 433. *Termes de la Ley*, Art. *Journies Account*; Com. Dig. *Abatement*, P. There are some authorities for the proposition that the writ by journeys accounts is a continuance of the former writ. But Lord Coke calls it "*quodam modo*, a continuance." And Lord Lyndhurst C. in *Davies v. Lowndes*, 1 Phill. 328; 6 M. & Gr. 529, and the court of common pleas in a further stage of the same cause, 7 M. & Gr. 762, expressed a very strong opinion that it is not a continuance, strictly and properly, of the old writ, but is a new writ.

(*n*) 1 Ld. Raym. 283.

(*o*) 1 Ld. Raym. 433.

journeys accounts be, but by the same person, not only in representation, but strictly and truly the same person. (*p*)

However, where a party brings an action before the expiration of six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator may, within the equity of the fourth section of the statute of limitations (21 Jac. 1, c. 16), bring a new action; (*q*) provided he does it recently, or within a reasonable time. (*q*¹) No precise time is fixed as to what shall be deemed a reasonable time; but it should seem that the statute is the best guide upon the subject, and as that provides that a new action, in the cases enumerated in it, must be commenced *within a year*, so an executor ought also to bring a new action within that period. (*r*) In *Kinsey v. Hay-*

(*p*) See *Spencer's case*, 6 Co. 10 *b*.

(*q*) *Matthews v. Phillips*, 2 Salk. 425; *Kinsey v. Heyward*, 1 Lutw. 260.

(*q*¹) [By the English common law procedure act, 1852, §§ 135-6-7-8, an action does not abate by the death of a sole plaintiff or defendant, or of one or more of several plaintiffs or defendants; but the death being suggested upon the record, the action may proceed at the suit of the legal representatives of such sole plaintiff or by the surviving plaintiff or plaintiffs. If the above suggestion be not made the subsequent proceedings will be void. *Barnewell v. Sutherland*, 1 L., M. & P. 159; *Larchin v. Buckle*, 1 L., M. & P. 159; *Pinkus v. Sturch*, 5 C. B. 474; 2 Chitty Pl. (16th Am. ed.) 15. There is a corresponding provision in the statutes of Massachusetts, where the cause of action survives. Genl. Sts. Mass. c. 127, § 5 *et seq.* See *Booth v. Northup*, 27 Conn. 325; *Tyler v. Whitney*, 8 Vt. 26; *ante*, 594, note (*n*), 891, note (*c*). A writ does not abate by the death of either party, between the time when the writ is served, and the time of entering the action, provided the cause of action by law survives. *Clindenin v. Allen*, 4 N. H. 385; Genl. Sts. Mass. c. 127, § 6. See *post*, 2012, 2013. If the defendant dies, in an action the cause of which survives, there is no statute of limitations in Massachusetts which fixes the time within which the administrator of his estate

shall be cited in to defend the same. *Bank of Brighton v. Russell*, 13 Allen, 221. See *McLellan v. Lunt*, 14 Maine, 254; *Pettengill v. Patterson*, 39 Maine, 498. Under the code of procedure, in New York, in case of the death of a party to an action, the court on motion, at any time within one year thereafter, or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest, if the cause of action survives. Code of Pro. § 121. See *Ridgeway v. Bulkley*, 7 How. Pr. 269; *Potter v. Van Vranken*, 36 N. Y. 619. But where a sole defendant dies pending an action, after issue joined, and before trial, there seems to be no rule in New York by which his personal representatives are entitled to an order requiring the plaintiff to continue the action against them, as the defendants. In such a case, the plaintiff, at his election, may require it to be discontinued. *Keene v. La Farge*, 1 Bosw. (N. Y.) 671; 16 How. Pr. 377. See Genl. Sts. Mass. c. 127, § 5 *et seq.*]

(*r*) 2 Saund. 64 *a*, note to *Hodsdon v. Harridge*; [*Martin v. Anker*, 3 Hill Ch. 211; *ante*, 1880, note (*e*); *Huntington v. Brinkerhoff*, 10 Wend. 278; *Butts v. Genung*, 5 Paige, 254. Where an action is not barred at the death of the intestate, the administrator may sue at any time within the next year, though the ordinary

ward, (*s*) a year is said to be a reasonable time ; and the court of king's bench appears to be of this opinion in *Wilcox v. Huggins*, (*t*) where it is said, that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute, which gives the plaintiff a year to commence a new action, where the judgment is * arrested or reversed ; and that they would not go a moment farther, for it would let in all the inconveniences which the statute was made to avoid. Indeed, if the executor had been retarded by suits about the will or administration, and had shown that in pleading, it would have been otherwise, because the neglect would then have been accounted for. And Lee J. said, " I think what is or is not a recent prosecution in a case of this nature, is to be determined by the discretion of the court from the circumstances of the case ; but generally the year in the statute is a good direction." However, in *Lethbridge v. Chapman*, (*u*) the action was allowed to be brought within fourteen months after the testator's death, though no reason was assigned for it. Upon the whole, therefore, it seems prudent for the executor to bring a new action as soon as he possibly can after the death of his testator, and at all events not to delay it beyond a year. (*v*) But in *Curlewis v. Lord Mornington*, (*x*) it was expressly held, that the executor was not bound to the year, if under the circumstances he can fairly be said to have used due diligence. (*x*¹)

The form of the replication by an executor to a plea of the statute, where he recently brings a new action after the death of a testator, is to state, that the testator on such a day sued out a writ of summons against the defendant, whereby he was commanded, &c. (and then continue the writ down to the time of the testator's death) ; that he appointed the plaintiff as executor, recently after his death, to wit, on such a day, &c. the plaintiff sued out the writ upon which the action is founded ; that the several writs so prosecuted by the testator against the defendant were with an intent to have impleaded the defendant upon the several promises in the declaration specified ; and that the writ sued out

period of limitation should expire during that year. *McNeill v. McNeill*, 35 Ala. 30. See *Manly v. Turnipseed*, 37 Ala. 522.]

(*s*) 1 *Ld. Raym.* 434.

(*t*) 2 *Str.* 207 ; *Fitg.* 170, 289.

(*u*) 15 *Vin.* 103, *in margine.*

(*v*) 2 *Saund.* 64 *b*, note.

(*x*) 7 *El. & Bl.* 283 ; *S. C.* in error, 27 *L. J. Q. B.* 439.

(*x*¹) [*Story J.* in *Trecothick v. Austin*, 4 *Mason*, 26, 27 ; *Hunter v. Glenn*, 1 *Bailey Eq.* 541 ; *Parker v. Fassit*, 1 *Harr. & J.* 337 ; *Allen v. Ranntree*, 1 *Speers*, 80.]

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by the plaintiff against the defendant was prosecuted against him with an intent to implead him for the causes * of action in the declaration specified, and upon his appearance to declare against him for the said several causes of action, and that he afterwards, on, &c. declared against the defendant, &c. with an averment that the several causes of action accrued within six years next before the suing out of the writ first above specified by the testator. (y)

Again, if an executor bring *assumpsit*, but die before judgment, and the six years run, his executor may, notwithstanding, bring a fresh action, so as he bring it in a reasonable time, which is to be decided at the discretion of the justices upon the circumstances of the case. (z)

The principle of these cases, according to the judgment of Lord Chief Justice Treby, in the above mentioned case of *Kinsey v. Heyward*, is, that when once the proviso in the statute of limitations is complied with by the commencement of an action within due time, the party is out of the purview of the act, and set at liberty out of the restraint of the said statute. (z¹) But the true ground of these decisions appears to be that they proceed upon the equity of the fourth section of the statute, and that the courts have extended that section to the case of an executor whose testator has died pending an action brought by him; which, though not within the words of it, was evidently within the mischief. (a) Accordingly, in *Adam v. The Inhabitants of the City of Bristol*, (b) the premises of A., a termor, having been burnt by a riotous assembly, A. complied with all the requisites of the statute 7 & 8 Geo. 4, c. 31, and commenced an action against the inhabitants of the city and county within three months from the offence. Before verdict or judgment, and after the expiration of the three months, A. died. His executrix commenced an action against the inhabitants on the seventh day from A.'s death. And the court of king's bench held, that supposing an executrix entitled to sue in any such case (as to which the court gave no * opinion), (c) the action, having been commenced more than three months from the offence, was too late under the provision of section 3 of the statute, viz,

(y) 2 Saund. 64 c, note.

(z) Bull. N. P. 150 a.

(z¹) [See *Downing v. Lindsay*, 2 Penn. & M. 144. St. 382.]

(a) 2 Ad. & El. 403, 404; [Story J. in *Trecothick v. Austin*, 4 Mason, 26, 27.]

(b) 2 Ad. & El. 389; S. C. *nomine Till*

— *Adam v. Inhabitants of Bristol*, 4 Nev.

(c) See *ante*, 795.

“Provided also, that no person shall be enabled to bring any such action, unless he shall commence the same within three calendar months after the commission of the offence;” and that there was no analogy between this case and the above decisions on the general statute of limitations. But the same equitable construction that has been applied, as above mentioned, to the 4th section of the statute of James, has been followed as to the limitation of actions on bonds, &c. imposed by the stat. 3 & 4 W. 4, c. 42, s. 3. (d)

Where the right of action accrued to the testator during his residence abroad, and he died abroad, never having returned to this country after the accrual thereof, the statute is no bar to an action by his executors, although it accrued more than six years before action brought; at all events if it be brought within six years after his death. (e) For the case is saved by the 7th section of the statute (which provides that if the person entitled shall be abroad at the time the cause of action accrued, such person may bring his action within six years of his return from beyond the seas), though not strictly within the words of it. It has, indeed, been affirmed that the executor may bring the action at any time, on the ground that the case is out of the statute altogether. But the more reasonable equity, perhaps, is to consider the right of action as accruing to the executor at the death of the testator, and that the action ought to be brought within six years after that time.

Where the plaintiff declares as executor or administrator, upon a cause of action arising in the time of his testator or intestate, the defendant cannot, at the trial, deny the title of the plaintiff as executor or administrator, unless there be * a plea of *ne unques executor*, or *ne unques administrator*. (e¹) Thus, in an action of *assumpsit* by an ad-

Evidence
of plain-
tiff's being
executor:
where nec-
essary:

(d) *Sturgis v. Darrell*, 4 H. & N. 622; *Axers v. Musselman*, 2 Browne, 115; S. C. in error, 6 H. & N. 120.

(e) *Townsend v. Deacon*, 3 Ex. 706. *Chapman v. Davis*, 4 Gill, 166; *Thames v. Richardson*, 3 Strobb. 484; *Cheek v.*

(e¹) [*Clark v. Pishon*, 31 Maine, 503; *Wheatly*, 11 Humph. 556; *Collins v. Thomas v. Tanner*, 6 T. B. Mon. 52; *Hyman v. Gray*, 4 Jones (Law), 155; *Sullivan v. Homacker*, 6 Florida, 372; *Aldis v. Burdick*, 8 Vt. 21; *Clapp v. Beardsley*, 1 Vt. 151; 2 Greenl. Ev. §§ 339, 340, 341; *Cheatham v. Riddle*, 12 Texas, 112; *Wheatly*, 11 Humph. 556; *Collins v. Ayres*, 13 Ill. 358; *Tapley v. Magee*, 6 Ired. 56; *Pollard v. Buttery*, 3 Blackf. 239; S. C. 4 Blackf. 48; *Codding v. Whitaker*, 5 Blackf. 470; *Scanlan v. Ruble*, 4 Blackf. 481; *Balance v. Frisby*, 2 Scammon, 165; *Kelly v. Thompson*, 2 Bre-

ministrator, on promises to the intestate, the plea of *non-assumpsit* admits the title of the plaintiff as administrator, and the defendant will not be allowed to insist on the production of the letters of administration, (*e*²) or to object that they are not duly stamped, (*f*) nor that the supposed intestate has made a will and appointed an executor. (*g*) So, in an action of trover by an executor or administrator, on the possession of his intestate, if the defendant pleads the general issue, he will not be allowed to controvert the title of the plaintiff as administrator. (*h*) So where the plaintiff sues as executor, and there is no plea of *ne unques executor*, he cannot be called upon to prove that the testator is dead. (*i*)

However, the plea of the general issue only admits the title stated in the declaration; and therefore, if that title be insufficient, the plaintiff cannot recover. Thus, in an action by an administrator on a judgment recovered by his intestate in the king's bench at Westminster (which was *bonum notabile* in Middlesex), (*j*) where the plaintiff made *profert* (which at that time was necessary) of letters of administration from the archdeacon of Dorset, and the defendant pleaded a plea which admitted the letters of administration, it was held, on a motion of arrest in judgment, that the plea only admitted the plaintiff's title as stated, which appeared on the record an insufficient title; (*k*) for that the court

vard, 58; *Gibbs v. Caboon*, 3 Dev. (Law) 80; *Brown v. Nourse*, 55 Maine, 230; *Kowanachi v. Askew*, 17 Ark. 595; *Worshaw v. Goar*, 4 Porter (Ala.), 441; *Reynold v. Torrance*, 2 Brevard, 59; *Hughes v. Clayton*, 3 Call, 554.]

(*e*²) [*M'Kimm v. Riddle*, 2 Dallas, 100; *Wise v. Getty*, 3 Cranch C. C. 292; *Rawlings v. Paty*, 23 Ark. 204; *Hutchinson v. Bobo*, 1 Bailey, 546; *Kenan v. Du Bignon*, 46 Geo. 258.]

(*f*) *Thynne v. Protheroe*, 2 M. & S. 553.

(*g*) *Marsfield v. Marsh*, 2 Ld. Raym. 824; S. C. *nomine Blainfield v. Marsh*, 7 Mod. 141; 1 Salk. 285; *Holt*, 44; [*Quidort v. Pergeaux*, 18 N. J. Eq. 472.]

(*h*) *Ib.* 2 Saund. 47 z, note to *Wilbraham v. Snow*.

(*i*) *Loyd v. Finlayson*, 2 Esp. 564. [As to the effect of the letters of administration to prove the death of the testator or

intestate, see *Tisdale v. Conn. Life Ins. Co.* 26 Iowa, 177; S. C. 28 Iowa, 12; *Mutual Benefit Life Ins. Co. v. Tisdale*, 3 Central L. J. 130. In some cases the grant of letters of administration has been held to be *prima facie* evidence of the intestate's death at that time. *Sims v. Boynton*, 32 Ala. 353; *Peterkin v. Inloes*, 4 Md. 175; *Brickhouse v. Brickhouse*, 11 Ired. (Law) 404; *Munroe v. Merchant*, 26 Barb. 383; *Jeffers v. Radcliffe*, 10 N. H. 242; *Siebert v. True*, 8 Kansas, 52.]

(*j*) See *ante*, 289, 290.

(*k*) *Adams v. Savage*, 6 Mod. 134. [So the defendant may show that the plaintiff cannot maintain the action as administrator, because there is an executor. *Chew v. Travers*, 2 Brevard, 146. So any other fact going to show that his appointment as an administrator was a nullity. *Blair v. Cincros*, 10 Texas, 34.]

would take judicial notice that the king's bench was not under the jurisdiction of the archdeacon of Dorset, and, by consequence, that an administration granted by him could not entitle the plaintiff to bring an action upon a *judgment recovered there. But Holt C. J. said that if the plaintiff had not set forth what kind of administration he claimed by, but had only generally alleged himself administrator of the goods and chattels of the intestate, and the defendant had not put him upon showing it by craving *oyer* of the letters of administration, but had pleaded over, it would have been an admission of the plaintiff's right of suing as administrator as he had alleged. (l)

Again, where the plaintiff declared *on a cause of action arising in his own time*, and made *profert* of the probate or letters of administration, and the defendant pleaded the general issue, such plea did not formerly admit the plaintiff's title as executor or administrator. (l¹) Thus, where the plaintiff declared as administrator, in an action of trover, on a conversion in his own time, it was held that the plea of *not guilty* did not admit his title as administrator, and that as the letters of administration were not properly stamped, (l²) he could not recover. (m)

But now by rule 5, T. T. 1853, in all actions by or against executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as an issue, unless specially denied.

However, where the plaintiff declares in trespass or trover, on his *constructive* possession as executor or administrator, without naming himself executor, he must, if his right to the property be put in issue, show his title as executor or administrator at the trial. (n)

But where the executor has been in *actual* possession of the property which is the subject of the suit, it will not be necessary for him to give evidence of his title as executor or administrator,

(l) 6 Mod. 136.

(l²) [See *Miller v. Henderson*, 24 Ark.

(l¹) [See *Aldis v. Burdick*, 8 Vt. 21; 344.]

Clapp v. Beardsley, 1 Vt. 151; *Kesler v. Roseman*, *Busbee* (N. Car.), 389; *Browning v. Huff*, 2 Bailey, 174; *Macon &c. R. Co. v. Davis*, 18 Geo. 679; *Robinson v. McDonald*, 2 Geo. 116; *ante*, 1875, and note (m¹).]

(m) *Hunt v. Stevens*, 3 Taunt. 115, by Lawrence J.; 2 Saund. 47 z, note to *Wilbraham v. Snow*. But see *Watson v. King*, 4 Campb. 272, and *Loyd v. Finlayson*, 2 Esp. 564.

(n) *Ante*, 304, 305.

in an action against a wrong-doer. (*o*) And in * such case it should seem that the naming himself executor or administrator in the declaration may be regarded as mere surplusage. (*p*)

It remains to consider, what shall be sufficient evidence of the plaintiff's title as executor or administrator, when it becomes necessary to prove it, either under a plea denying the representative character of the plaintiff, or in a suit on a cause of action arising in the plaintiff's own time. (*p*¹)

what is
sufficient
proof of
the plain-
tiff being
executor,
&c:

Although the executor derives his title from the will by which he is appointed, and not from the probate of the will, yet it is the probate alone which authenticates his right, and the probate, or something tantamount thereto, is the only legitimate evidence of personal property being vested in an executor, or of the executor's appointment. (*q*) Therefore, the original will cannot be read in evidence for that purpose, although produced by the officer of the court of probate, unless it bears the seal of the court, or some other mark of authentication. (*r*) The seal of the court of probate on the probate proves itself. (*s*) The probate need not be stamped under the stat. 20 & 21 Vict. c. 61, for that enactment applies only to a copy of the probate. (*t*)

probate:

If the probate is lost, it was not the practice of the ecclesiastical court to grant a second, but only an exemplification from the records of the court; which would be evidence of the proving the will. (*u*) And an examined copy of the probate is evidence of the person there named being executor; because the probate is an original, taken by authority, and of a public nature. (*v*)

(*o*) *Ante*, 305; [Cheek v. Wheatly, 11 Humph. 556.] But see, also, Waller v. Drakeford, 1 El. & Bl. 49.

(*p*) Com. Dig. Pleader, 2 D. 1. [So, wherever the plaintiff describes himself as executor or administrator, but states a cause of action in his own right, a plea that he is not executor or administrator is not good. Spurgen v. Robinet, 4 Bibb, 75; Bailey v. Gatton, 14 Ark. 180.]

(*p*¹) [Administration cannot be proved by parol evidence. Hay v. Bruere, 6 N. J. (Law) 212.]

(*q*) *Ante*, 292, 293; Hamilton v. Aston, 1 Carr. & Kirw. 679. [See Smith v. Maybry, 7 Yerger, 26; Seymour v. Beach, 4 Vt. 493.]

(*r*) R. v. Barnes, 1 Stark. N. P. C. 243; Pinney v. Pinney, 8 B. & C. 335. Nor is a copy of the will evidence. Bull. N. P. 246.

(*s*) Court of probate act, 20 & 21 Vict. c. 77, s. 22. See, also, S. P. before the act passed, Kempton v. Cross, Cas. temp. Hardw. 108.

(*t*) Rippon v. Priest, 3 Fost. & F. 644.

(*u*) Shepherd v. Shorthouse, 1 Stra. 412; Bull. N. P. 246.

(*v*) Hoe v. Nelthorpe, 3 Salk. 154; S. C. 1 Ld. Raym. 154; S. P. by Holt C. J. in R. v. Haines, Skinn. 584; Bull. N. P. 246.

* It must be observed, that all that is required, either in the case of an executor or administrator, is to show by legitimate evidence that the court of probate has given authority to the person to administer. It is only the act of the court of probate that is to be proved. The probate is only a copy of this act. The original book containing the entry of the act of court is the original, and therefore the primary evidence. Hence the act book, containing an entry of a will having been proved, and of probate granted to the executors therein named, is admissible evidence of those persons being the executors, without accounting for the non-production of the probate. (x) And a copy of the act book is now admissible under the stat. 14 & 15 Vict. c. 99, s. 14. (y)

Accordingly it was held, in a case before the court of probate act (1857), that in order to prove the title of a lessor of the plaintiff in ejectment, claiming as executor, it was sufficient (without laying ground for the reception of secondary evidence) to produce minutes of the proof of the will and sealing of probate, indorsed on the will by the surrogate and registrar of the ecclesiastical court; it being proved also that, by the practice of the particular court, no other record of such grants was kept. (z)

An exemplification of letters of administration *de bonis non*, reciting the former grant of administration, requires to be stamped only as an exemplification of a single proceeding under stat. 55 Geo. 3, c. 184, Sched. part. II. tit. "Proceedings in the Ecclesiastical Courts." For the one title appears merely as identifying the party on whom the other was conferred. (a)

To prove that the probate of a will had been revoked, an * entry of the revocation in a book of the prerogative court, in which all causes were entered by the registrar, and which was kept as the only record of such proceedings, and of the decree of the court, was admitted to be good evidence. (b)

The title of several plaintiffs, claiming as executors, is well evidenced by probate, granted to one only, of the will appointing them all. (c) And the rule is the same whether they sue in their

(x) Cox v. Allingham, Jacob, 514.

(y) Dorrett v. Meux, 15 C. B. 142.

(z) Doe v. Mew, 7 Ad. & El. 240; S. C. 2 N. & P. 260.

(a) Doe v. Gunning, 7 Ad. & El. 240.

(b) Ramsbottom's case, 1 Leach Cr. C. 60, note (c); 1 Phill. Ev. 378, 6th ed.

(c) Walters v. Pfeil, 1 Mood. & Malk. 362; Scott v. Briant, 6 Nev. & M. 381.

representative character or not; (*d*) for probate granted to one of several executors inures to the benefit of all. (*e*)

The title of an administration *de bonis non* is sufficiently proved by the letters of administration *de bonis non*, without those granted to the first executor or administrator. (*f*)

Where an executor or administrator produces the probate or letters in proof of his representative character, and his case shows that he sues for a greater value than is covered by the probate or administration stamp, he cannot recover. (*g*) Thus, in *Hunt v. Stevens*, (*h*) the plaintiff declared in trover as administrator, upon a conversion of his own time. It appeared that the deceased employed the defendant, who was an upholsterer, to furnish his house, and the defendant, accordingly, a fortnight before his death, sent in goods to the amount of at least 1,300*l*. During the night of the day on which the intestate died, the defendant privately conveyed away the furniture from the house. The plaintiff afterwards took out administration, on a stamp for a value not exceeding 1,000*l*. And it was held, that, as he had himself shown that he sued for a greater value than was covered by the stamp, * he could not recover. So, in *Carr v. Roberts*, (*i*) an intestate had granted an annuity to Anne Smith, and afterwards by deed conveyed his property to the defendant, who covenanted to indemnify him against the payment of the annuity. Default having been subsequently made in the payment, during the intestate's life, the annuitant sued his administratrix, and recovered judgment for debt and costs, exceeding 20*l*. The administratrix paid this, and then sued the defendant on his covenant for the amount. And the court of king's bench held, on the authority of *Hunt v. Stevens*, and overruling the decision of Lord Tenterden at *nisi prius*, (*k*) that the right to recover this was a part of the intestate's estate, and rendered the letters of administration liable to stamp duty. (*l*)

(*d*) 1 Mood. & Malk. 362.

(*e*) *Ante*, 381, 382; *Watkins v. Brent*, 7 Sim. 512.

(*f*) *Catherwood v. Chabaud*, 1 B. & C. 150. See, also, *Gradell v. Tyson*, 2 Stra. 716. [Where issue is joined on a plea denying that the plaintiff is administrator, proof that he is administrator, with the will annexed, supports the issue on the

part of the plaintiff. *Owings v. Beall*, 1 Litt. (Ky.) 257.]

(*g*) See *ante*, 595 *et seq.*, as to the amount of stamp.

(*h*) 3 Taunt. 113.

(*i*) 2 B. & Ad. 905.

(*k*) 2 Mood. & Malk. 45.

(*l*) See *ante*, 614.

The title of the plaintiff, as administrator, may be proved by letters of administration: the production of the letters of administration, or of a certificate or exemplification thereof granted by the court of probate, (*m*) or, without producing the letters of administration, by the original book of acts, directing the grant of the letters; (*n*) or by a copy of it since the stat. 14 & 15 Vict. c. 99. (*o*) The original book of acts, directing letters of administration to be granted, with the surrogate's *fiat* for the same, was held to be evidence of the title of the party to whom administration of the intestate's effects is granted, without producing the letters of administration themselves (notwithstanding subsequent letters of administration granted to another), if the first are not recalled; for the original book was the authority for the proper officer to * make out letters of administration, and the letters of administration were only the copy of the original minutes of the court, drawn up in a more formal manner. (*p*) So an examined copy of the act book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce his letters of administration. (*q*)

There has already been occasion to consider how far a probate or letters of administration, when produced by the plaintiff, are conclusive upon the defendant. (*r*) But it may be convenient, in this place, to recapitulate some of the evidence. points established on this subject.

The defendant cannot prove that another person was appointed

(*m*) *Kempton v. Cross*, Cas. temp. Hardw. 108; Bull. N. P. 246. Administration is generally granted under seal; but it may also be granted by entry in the registry without letters under seal. 11 Vin. Abr. 70; Exor. D. pl. 4; 1 Phill. Evid. 378, 6th ed. [See *Collins v. Ayers*, 13 Ill. 358; *Owings v. Beall*, 1 Litt. (Ky.) 257; *Westcott v. Cady*, 5 John. Ch. 334; *ante*, 550, note (*g*); *Seymour v. Beach*, 4 Vt. 493; *Davis v. Shuler*, 14 Florida, 438. In New Hampshire, a certificate of a register of probate is not competent evidence of a grant of administration. A copy of the record, where it is kept, is the proper evidence. *Morse v. Bellows*, 7 N. H. 549. See *Dickinson v. M'Craw*, 4 Rand. 158. In New York an exemplifica-

tion of letters of administration from the surrogate's office is good evidence, without accounting for the non-production of the original letters. *Jackson v. Robinson*, 4 Wend. 436.]

(*n*) *Ib.*; *Elden v. Keddell*, 8 East, 187; S. P. by Bayley J. in *Ramsbottom v. Buckhurst*, 2 M. & Sel. 657; 1 Phill. Evid. 378, 6th ed.

(*o*) *Dorrett v. Meux*, 15 C. B. 142.

(*p*) *Elden v. Keddell*, 8 East, 187; *Garrett v. Lister*, 1 Lev. 25; Bull. N. P. 246; 2 M. & Sel. 567; 1 Phill. Evid. 378, 6th ed.

(*q*) *Davis v. Williams*, 13 East, 232; 1 Phill. Evid. 378, 6th ed.

(*r*) *Ante*, 549 *et seq.*; [*Raborg v. Hammond*, 2 H. & Gill, 42.]

executor or administrator, or that the testator was insane, or that the will, of which probate has been granted, was forged; for that would be directly contrary to the seal of the court of probate in a matter within its immediate jurisdiction. (s)

But it might be proved, on the part of the defendant, under a plea of *ne unques executor*, that the deceased had *bona notabilia* in divers dioceses, and consequently that the bishop or other inferior judge had no jurisdiction to grant probate or administration. (t) But a defence that, although the probate was valid, the particular debt did not pass under it, must have been specially pleaded, and could not be shown under *ne unques executor*. (u)

Again, it may be proved, under a plea of *ne unques executor*, &c. that the supposed testator or intestate is alive; for in such case, the court of probate can have no jurisdiction. (x) And it may be shown that the seal attached to the supposed probate has been forged, or that the letters have been revoked. (y)

Again, the defendant may plead in his defence, that he has paid the debt, which is the subject of the action, to an executor who had obtained probate of a forged will, unrepealed at the time of the payment. (z) But payment of money under the probate of a supposed will of a living person would be void; because, in such case, the court of probate has no jurisdiction, and the probate can have no effect. (a)

It may be doubted whether admissions made by an executor or administrator, before he was clothed with that character, are receivable in evidence against him in an action brought by or against him in his representative capacity. (b) How-

Whether
admissions
made by
an execu-

(s) *Ante*, 549, 550, 563; [*ante*, 1887; *Fishwick v. Sewell*, 4 Harr. & J. 393; *Wilson v. Ireland*, 4 Md. 444; *Leonard v. Cameron*, 39 Miss. 419; *Raborg v. Hammond*, 2 H. & Gill, 42.]

(t) *Ante*, 289, 290; *Marriot v. Marriot*, 1 Stra. 671.

(u) *Ante*, 563; *Stokes v. Bate*, 5 B. & C. 491; *Easton v. Carter*, 6 Ex. 8.

(x) *Ante*, 409, note (a), 563, 586, note (a).

(y) *Ante*, 563.

(z) *Ante*, 551; *Allen v. Dundas*, 3 T. R. 125.

(a) 3 T. R. 130. [See *ante*, 409, note (a), 549, note (a), 586, note (a).]

(b) See *Stewart v. Edmonds*, *ante*, 407,

note (z). [It has been held that the admissions of an executor or administrator, made before he was appointed, cannot be received to prejudice the rights of heirs and creditors interested in the estate. *Thomasson v. Driskell*, 13 Geo. 253; *Gaines v. Alexander*, 7 Grattan, 257; *Gilkey v. Hamilton*, 22 Mich. 283. But evidence of the admissions and promises of an executor or administrator, made after his appointment, is admissible to charge the estate in a suit by or against him in his representative capacity. *Lawson v. Powell*, 31 Geo. 681; *Floyd v. Wallace*, 31 Geo. 688; *Matson v. Clapp*, 8 Ohio, 248; *Emerson v. Thompson*, 16

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ever, in *Smith v. Morgan*, (c) Tindal C. J. admitted the declaration of the assignees of a bankrupt, made by them before their appointment, stating that he was not aware of any distinction between the admissions of parties suing in a representative character and in their own right. (d)

Admis-
sions by
co-execu-
tor.

The admission of one of several executors or administrators will not bind the others ; at all events, unless it is made in the character of executor. Therefore where two executors were sued as such on a covenant of their testator for quiet enjoyment, and the question was whether the defendants who had evicted the plaintiff had done so under lawful title, it was held that an admission of *one* of the defendants was no evidence of such title. (e)

Costs.

If the judgment be for the plaintiff, he is entitled to the costs as in an ordinary case. But it was uniformly held, up * to the time of the passing of the statute 3 & 4 W. 4, c. 42 (hereafter to be mentioned), that executors and administrators were not liable to costs, when plaintiffs, upon a nonsuit or verdict, where the action was brought upon a contract entered into by the testator or intestate, or for a wrong done in his lifetime. (f)

Mass. 429 ; *Atkins v. Sanger*, 1 Pick. 192 ; *Heywood v. Heywood*, 10 Allen, 105 ; *Faunce v. Gray*, 21 Pick. 243 ; *Hill v. Buckminster*, 5 Pick. 391 ; *Allen v. Allen*, 26 Missou. 327 ; *Haleyburton v. Kershaw*, 3 Desaus. 105. But see *Wright v. Wright*, 2 Brevard, 125 ; *Ciples v. Alexander*, 3 Brevard, 558 ; *Rhodes v. Seymour*, 36 Conn. 1 ; *Pease v. Phelps*, 10 Conn. 68 ; *Hueston v. Hueston*, 2 Ohio St. 488. As to admissions by an administrator in reference to acts of his intestate, in a case where the administrator is plaintiff, see, further, *Wheelock v. Wheelock*, 5 Vt. 433. The admissions of an executrix are competent evidence to charge the estate of the deceased in the hands of an administrator *de bonis non*. *Lashlee v. Jacobs*, 9 Humph. 718 ; *Emerson v. Thompson*, 16 Mass. 429. But see *McArthur v. Corrie*, 32 Ala. 75 ; *Pease v. Phelps*, 10 Conn. 62. But in an action upon a judgment recovered in another state by an administrator appointed in that state, his admissions that the judgment was fraudulent were held not

competent against the administrator appointed in Texas and bringing the action there. *Norwood v. Cobb*, 20 Texas, 588.]

(c) 2 M. & Rob. 257.

(d) See, *contra*, *Fenwick v. Thornton*, M. & M. 51, *coram* Lord Tenterden.

(e) *Fox v. Waters*, 12 Ad. & El. 43. See, also, *Scholey v. Walton*, 12 M. & W. 510 ; [*Hammon v. Huntley*, 4 Cowen, 493 ; *Forsyth v. Ganson*, 5 Wend. 558 ; *McIntire v. Morris*, 14 Wend. 90 ; *James v. Hackley*, 16 John. 273 ; *Walkup v. Pratt*, 5 Harr. & J. 53.]

(f) *Jones v. Williams*, 6 M. & Sel. 178 ; *Barnard v. Higdon*, 3 B. & Ald. 213 ; S. C. 1 Chitt. Rep. 628 ; *Woolly v. Sloper*, 9 Bing. 754 ; *Pickup v. Wharton*, 2 Cr. & M. 401 ; S. C. 4 Tyrwh. 224 ; [*Frink v. Luyton*, 2 Bay, 166 ; *Jamison v. Lindsay*, 1 Bailey, 79 ; *Bordeaux v. Cave*, 2 Bailey, 6 ; *Mealer v. Meyers*, 2 Bailey, 53 ; *Jameson v. Young*, 2 Litt. 387 ; *Hatcraft v. Gentry*, 2 J. J. Marsh. 499 ; *Prouty v. M'Dougall*, 6 Cowen, 612 ; *Frogg v. Long*, 3 Dana, 157 ; *Chamberlin*

But now by stat. 3 & 4 W. 4, c. 42, s. 31, "in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the said superior courts shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner."

In the construction of this statute, it has been held that the act has put executors and administrators, when plaintiffs, on the same footing as other plaintiffs, as to their liability to costs, (*f*¹) unless where the court sees that they have been misled by some misconduct on the part of the defendant. Therefore it is not a sufficient claim for relief, that the action was brought *bonâ fide* with appar-

v. Spencer, 4 Cowen, 550; *Ketchum v. Ketchum*, 4 Cowen, 87; *Morse v. M'Coy*, 4 Cowen, 551; *Pillsbury v. Hubbard*, 10 N. H. 224; *Harrison v. McMenomy*, 2 Edw. Ch. 251; *Moses v. Murgatroyd*, 1 John. Ch. 473; *Gibbons v. Johnson*, 4 Ill. (3 Scam.) 61; *Van Orden v. Reynolds*, 18 Wend. 635; *Swift v. Roalwine*, 1 Brevard, 175; *Holley v. Christopher*, 3 T. B. Monr. 14; *Woodbridge v. Draper*, 15 Missou. 460; *Burhams v. Blanchard*, 1 Denio, 626; *Callender v. Keystone Ins. Co.* 23 Penn. St. 371. In New Hampshire, where judgment for costs is rendered upon a nonsuit, in an action brought by an administrator for a cause of action which accrued to his intestate, and is so alleged, the judgment is properly entered, in the first instance, against the goods and estate of the intestate in the hands of the administrator; but, upon the return of *nulla bona* on the execution in such case, and *scire facias* to the administrator, execution is to be awarded against him, *de bonis propriis*, if he fails to show cause why it should not be awarded. It is held to be good cause why such execution should not be awarded that the administrator commenced the action in good faith, upon a supposed valid claim

which he had reasonable expectation of recovering, although at the time of suit brought he had administered all the estate, and settled his administration account, and had no balance in his hands to be distributed. *Folsom v. Blaisdell*, 38 N. H. 100. See *Pillsbury v. Hubbard*, 10 N. H. 233.] The reason was that the statute, 23 Hen. 8, c. 15, s. 1, by which costs were first given to defendants, was confined to wrongs done to and contracts with *the plaintiff*.

(*f*¹) [Such is the law in Vermont. *O'Hear v. Skeeles*, 22 Vt. 152. An executor or administrator instituting a suit against a debtor to his testator's or intestate's estate; as he will, if he succeeds, be entitled, under the general rule, to the costs of his suit from the debtor; so if he fails he must pay the costs of his adversary. *Westley v. Williamson*, 2 Moll. 458; *Murray v. Phillips*, 1 Paige, 472; *Arnoux v. Steinbrenner*, 1 Paige, 82; *Nicoll v. Trustees of Huntington*, 1 John. Ch. 166; *Goodrich v. Pendleton*, 3 John. Ch. 520; *Roosevelt v. Ellithorp*, 10 Paige, 415; *Harrison v. McMenomy*, 2 Edw. Ch. 251; *Capehurt v. Huey*, 1 Hill Ch. 405; *Peyton v. McDowell*, 3 Dana, 314; *Shepherd v. McClain*, 3 C. E. Green, 128; 2 Dan. Ch. Pr. (4th Am. ed.) 1382.]

ently reasonable grounds for suing, and that the plaintiff was taken by surprise by the defence. (*g*) The court of king's bench have held * that where a single judge has made an order under the statute to exempt the plaintiff from liability to costs, such order is final, and cannot be reviewed by the court. (*h*) But, in a subsequent case, the barons of exchequer expressed their dissent from this decision in K. B. (*i*) The application for relief should regularly be made before the taxation takes place. (*k*)

Again, if the plaintiff brings an action on a wrong done in his own time, (*l*) or upon a contract, express or implied, made with himself, he shall pay costs to the defendant, though he sues as executor or administrator, if he fails in the action, by virtue of the statute of Hen. 8, (*m*) and independently of the statute of W. 4. (*n*) And in actions of this description, the plaintiff cannot, in any instance, be relieved from his liability to costs, by the provisions of the latter statute. For the operation of that act is confined to cases where the executor or administrator was not liable to costs under the statute of Hen. 8. Therefore, where an executor sues on a count upon promises made to himself as executor, and is nonsuited, he is liable to costs, and the court, or a judge, has no discretion to exempt him from them under the statute of W. 4. (*o*)

(*g*) *Southgate v. Crowley*, 1 Bing. N. C. 518; *Godson v. Freeman*, 2 Cr., M. & R. 585; S. C. 1 Tyrwh. & Gr. 35; *Farley v. Bryant*, 3 Ad. & El. 839; *Engler v. Twisden*, 2 Bing. N. C. 263; *Birkhead v. North*, 2 Bail Court Rep. 9; S. C. 4 D. & L. 732. See, also, *Wilkinson v. Edwards*, 1 Bing. N. C. 301; *Prole v. Wiggins*, 3 Bing. N. C. 235. Mere *silence* as to the defence will not suffice. 2 Bail Court Rep. 9.

(*h*) *Maddock v. Phillips*, 3 Ad. & El. 198.

(*i*) *Lakin v. Massie*, 4 Dowl. 239.

(*k*) *Ashton v. Pointer*, 5 Tyrwh. 326, by Parke B.

(*l*) *Cockerill v. Kynaston*, 4 T. R. 227; S. C. cited by Le Blanc J. in *Ord v. Fenwick*, 3 East, 110; *Eaves v. Mocato*, 1 Salk. 314; *Hole v. King*, Com. Rep. 162; *Hollis v. Smith*, 10 East, 293; *Grimstead v. Shirley*, 2 Taunt. 116; 2 Saund. 47 y, note to *Williamson v. Snow*; *Farley v.*

Farley, 2 Bailey, 319. In case the plaintiffs describe themselves as executors, and the cause of action is alleged to have accrued to them after the decease of the testator, and the executors might have sued in their own right, judgment for costs, if they fail in the action, may be entered against them *de bonis propriis*: *Moulton v. Wendell*, 37 N. H. 406; *Pillsbury v. Hubbard*, 10 N. H. 224; *Keniston v. Little*, 30 N. H. 322, 323.]

(*m*) See *ante*, 1895, note (*f*).

(*n*) *Dowbiggin v. Harrison*, 9 B. & C. 666; *Jobson v. Forster*, 1 B. & Ad. 6; *Slater v. Lawson*, 1 B. & Ad. 893; [*Barker v. Baker*, 5 Cowen, 267; *Chamberlin v. Spencer*, 4 Cowen, 550; *Ketchum v. Ketchum*, 4 Cowen, 87; *Frink v. Luyton*, 2 Bay, 166.]

(*o*) *Spence v. Albert*, 2 Ad. & El. 785; *Ashton v. Poynter*, 1 Cr., M. & R. 738; S. C. 5 Tyrwh. 322; overruling *Lysons v. Barrow*, 10 Bing. 563. It is too late to

Again, independently of the statute of W. 4, the court has, in actions by executors and administrators, as well as *in all other actions, the power of punishing the plaintiffs for misbehavior in the conduct of the suit, by the imposition of costs. (*p*) So it was held, before that statute, that where an executor or administrator had knowingly brought a wrong action, or otherwise been guilty of a wilful default, he should pay costs upon a discontinuance, (*q*) or for not proceeding to trial according to notice. (*r*) Again, an executor is liable independently of the statutes, to costs upon judgment of *non pros*; (*s*) and if he wishes to be relieved from costs, he should apply to the court for leave to discontinue, without payment of costs. (*t*) So executors or administrators have always been held liable to costs upon interlocutory motions. (*u*) The court will not suspend the payment of such costs until the

strike out such a count after the cause has been taken down to trial. *Tomlinson v. Nanny*, 2 Dowl. 17. [In Massachusetts, when a judgment for costs is rendered against an executor or administrator, in an action commenced by or against him, or in an action commenced by or against the testator or intestate; wherein the executor or administrator has appeared and taken upon himself the prosecution or defence, he shall be personally liable for the costs; and when judgment is recovered for costs only, the execution shall be awarded against the body, goods, and estate of the executor or administrator, as if it were for his own debt; but when the judgment is or debts for damages, and costs, an execution for the debt or damages shall be awarded against the goods and estate of the deceased in the hands of the executor or administrator; and another execution for the costs, against the goods, estate, and body of the executor or administrator, as if it were for his own debt. The costs, however, paid by executors or administrators, and for which they are made personally liable, shall be allowed in their administration accounts, unless the probate court decides that the suit was prosecuted or defended without reasonable cause. Genl. Sts. Mass. c. 98, § 13; c. 128, §§ 6, 7, 8, 9.

Actual payment is, by the terms of this statute, a condition precedent to the allowance of such costs in the account of the executor or administrator. *Thacher v. Dunham*, 5 Gray, 26. As to the law in Massachusetts before this statute, see *Hardy v. Call*, 16 Mass. 530; *Brooks v. Stevens*, 2 Pick. 68; *Healy v. Root*, 11 Pick. 389; *Pierce v. Saxton*, 14 Pick. 274; *Pillsbury v. Hubbard*, 10 N. H. 229, 230.]

(*p*) *Comber v. Hardcastle*, 3 Bos. & Pull. 115, 117, 118; [*Robert v. Ditmas*, 7 Wend. 522; *Taylor v. How*, 1 Wend. 34; *Pope v. Delavan*, 1 Wend. 68; *Davis v. Davis*, 3 Hill Ch. 377; *Sawyer J. in Folsom v. Blaisdell*, 38 N. H. 106; *Pillsbury v. Hubbard*, 10 N. H. 233; *Keniston v. Little*, 31 N. H. 318.]

(*q*) *Harris v. Jones*, 1 W. Bl. 451; *Melhuish v. Maunder*, 2 New Rep. 72; *Tidd*, 979, 9th ed. [See *Taylor v. How*, 1 Wend. 34. But it seems to be otherwise where he brings a wrong action by mistake. *Phenix v. Hill*, 3 John. 249.]

(*r*) *Woolley v. Sloper*, 9 Bing. 754; *Pickup v. Wharton*, 2 Cr. & M. 401; S. C. 4 Tyrwh. 224. [See *Morse v. M'Coy*, 4 Cowen, 551.]

(*s*) 2 Cr. & M. 403; 4 Tyrwh. 226; [*Rudd v. Cabbe*, 4 John. 190.]

(*t*) 1 Chitt. Rep. 629.

(*u*) *Tidd*, 979, 9th ed.

[1897]

plaintiff has received sufficient assets, to be paid *quando acciderint*. (x)

Executors and administrators are liable to costs in error in cases where they are liable to costs in the original action. (y)

Plaintiffs who live out of the jurisdiction of the court may be compelled to give security for costs, though such plaintiffs sue as executors. (z)

There has already been occasion (a) (in considering the subject of what suits commenced by a testator may be continued by the executor or administrator) to point out the course by which a judgment obtained by the deceased may be enforced by his personal representative. (a¹) It may here be * added, that although, generally speaking, a revival of the judgment is requisite, in order to obtain execution, yet if a testator or intestate has obtained a judgment, and a writ of *fi. fa.* or *ca. sa.* issues in his lifetime, it may be executed after his death. (b)

But until the executor or administrator has made himself a party to the judgment, he is not entitled, under the 61st section of the common law procedure act, 1854, to attach a debt due to the judgment debtor. (c)

If an executor or administrator obtains judgment, and then the probate or letters of administration are revoked, the regular mode for the defendant to obtain relief is by an *auditâ querelâ*; (d) though, perhaps, at this day, the court would relieve the defendant, in a summary way, by motion. In *Kennedy v. Kennedy*, (e) upon a rule to show cause why a trial should not be put off, it appeared that the action was brought by an administrator, and that a suit was depending in the spiritual court for revoking the letters of administration. But the court said that there was

(x) *Andrews v. Sealy*, 8 Price, 212; to costs, *Clarke v. Higgins*, 2 Root, 398. Tidd, 979, 9th ed. Where they are pursued in an action, defended by their testator, see *Farrier v. Cairns*, 5 Ham. 45.]

(y) *Williams v. Riley*, 1 H. Bl. 566. Since the stat. of W. 4 it should seem they are liable in all cases, unless the court or a judge shall otherwise order. (b) *Ellis v. Griffith*, 16 M. & W. 106. [See *Commonwealth v. Whitney*, 10 Pick. 434.]

(z) *Chevalier v. Finnis*, 1 Brod. & Bing. 277; S. C. 3 Moore, 602; *Chamberlain v. Chamberlain*, 1 Dowl. 366. (c) *Holmes v. Tutton*, 5 El. & Bl. 65.

(a) *Ante*, 898 *et seq.* (d) *Turner v. Davies*, 2 Saund. 148; S. C. 1 Mod. 62.

(a¹) [Where executors pursue an action commenced by their testator, see, as (e) *Sayer*, 99.]

(a) *Ante*, 898 *et seq.*

(a¹) [Where executors pursue an action commenced by their testator, see, as

[1898]

no need to put off the trial; for if the plaintiff should proceed to execution, and the letters of administration should afterwards be revoked, an *auditâ querelâ* would lie for the defendant.

Where an *auditâ querelâ* was brought against two executors, and only one appeared, and the other made default, he who appeared was awarded to answer alone. (*f*)

By stat. 9 & 10 Vict. c. 95, s. 56, any executor or administrator may sue and be sued in any of the county courts in like manner as if he were a party in his own right, and judgment and execution shall be such as in the like case would be given or issued in any superior court. County court act.

If the holder of a bill be dead, and the executor has not yet proved the will, it is said that the bill must nevertheless * be presented for payment at the regular time; but it should seem that the drawer and indorsers would not be discharged, provided presentment be made, and notice given of the dishonor, by the executor or administrator, at a reasonable time. (*g*) Present-
ment of bill
of ex-
change by
executor.

(*f*) 2 Saund. 148 *a*, note to *Turner v. Hubbard*, 4 Met. 252, 261, 262; *post*, 2003, Davies. note (*l*).]

(*g*) See Roscoe on Bills, 147; [*Rand v.*

[1899]

* CHAPTER THE SECOND.

OF REMEDIES FOR EXECUTORS AND ADMINISTRATORS IN EQUITY.

What suits
an execu-
tor may
have.

AN executor or administrator is entitled to all the equitable interests of the deceased, and may, in his representative capacity, enforce them in a court of equity. (a)

There has already been occasion to point out, (b) that, at law, the interest which the testator had in a *chose in action* jointly with another shall not pass to his executor. But in equity the same rule does not prevail. Therefore, where a mortgage is made to several persons jointly, they are, in equity, tenants in common of the mortgage money, and the representatives of such of them as may be dead are necessary parties, with the survivor, to a bill for foreclosure or redemption. (c)

The executors of the writer of letters may maintain a bill in equity to restrain the defendant from publishing them. Accordingly, Mrs. Stanhope was, on bill filed by the executors of Lord Chesterfield, restrained from publishing the letters which had been received by her husband, his natural son, from the testator. (d) So the representatives of Lord Clarendon obtained an injunction to restrain the printing of an unpublished copy of his History of the Rebellion, which had been given by a former representative of the author to a person under whom the defendant claimed, but not with an intention that he should publish it. (e)

* An executor or administrator may exhibit a bill for the discovery of the personal estate of the deceased. (f)

(a) Com. Dig. Chancery, 2 B. 1, 3 G. 1. 1647; *Folsom v. Marsh*, 2 Story, 100; 2 [See *West v. Bank of Rutland*, 9 Vt. 408; Story Eq. Jur. § 946 *et seq.*]

Adams v. Adams, 22 Vt. 50; *Morris v. Slasson*, 13 Vt. 296; *Beach v. Norton*, 9 Conn. 182, 196.]

(b) *Ante*, 843.

(c) *Vickers v. Cowell*, 1 Beav. 529.

(d) *Thompson v. Stanhope*, Ambl. 737.

See, also, *Granard v. Dunkin*, 1 Ball & Beat. 207; [2 Dan. Ch. Pr. (4th Am. ed.)

(e) *Queensberry v. Shebbeare*, 2 Eden, 329. [The receiver of letters has but a qualified property in them; they pass to the administrator, but are not assets in his hands. *Eyre v. Higbee*, 35 Barb. 502.]

(f) Com. Dig. Chancery, 2 B. 1; *Wright v. Bluck*, 1 Vern. 106. [The ob-

[1900] [1901]

An executor may, under certain circumstances, (*g*) file a bill to compel a legatee to refund his legacy; (*h*) though a court of law cannot entertain an action for that purpose. (*i*)

During the last twenty years numerous statutes have been passed providing facilities for executors in the discharge of their duties, and relieving them from some of the responsibilities incident to their office.

Thus by stat. 10 & 11 Vict. c. 96, entitled, *An act for better securing trust funds, and for the relief of trustees*, after reciting that "it is expedient to provide means for better securing trust funds, and for relieving trustees from the responsibility of administering trust funds in cases where they are desirous of being so relieved," it is enacted, "That all trustees, executors, administrators, or other persons, having in their hands any money belonging to any trust whatsoever, or the major part of them, shall be at liberty, on filing an affidavit shortly describing the instrument creating the trust, according to the best of their knowledge and belief, to pay the same, (*k*) with the privity of the

10 & 11
Vict. c. 96.
Trustees
may pay
trust
moneys or
transfer
stocks and
securities
into the
court of
chancery.

ject of this proceeding for discovery is effected in the probate court by statutes in some of the American States. In Massachusetts, see Genl. Sts. c. 96, § 6; *Martin v. Clapp*, 99 Mass. 470; *Arnold v. Sabin*, 4 Cush. 46; *Wilson v. Leishman*, 12 Met. 320; *O'Dee v. McCrate*, 7 Greenl. 467; *Higbee v. Bacon*, 7 Pick. 14; *Boston v. Boylston*, 4 Mass. 322; *Kimball v. Kimball*, 19 Vt. 579; *Case's Appeal*, 35 Conn. 115. Under the statute of Indiana, an administrator may file a bill in chancery against one who intermeddles with or embezzles goods of the estate, instead of proceeding at law. *Thorn v. Tyler*, 13 Blackf. (Ind.) 504.] Lapse of time will not of itself bar an executor of an executor of his right to have an account of his executor's testator's estate taken, with a view to ascertain such executor's liabilities as an accounting party. *Smith v. O'Grady*, L. R. 3 P. C. C. 311.

(*g*) See *ante*, 1450.

(*h*) See *Doe v. Guy*, 3 East, 123, by Lord Ellenborough. [A suit by an administrator, for reimbursement of sums

paid to creditors beyond the personal assets, is proper matter of equity jurisdiction. *Williams v. Williams*, 2 Dev. Ch. 69.]

(*i*) *Johnson v. Johnson*, 3 Bos. & Pull. 169; 3 East, 124.

(*k*) Where an executor pays a legacy into court under this act, his costs of paying it in are to be borne by the estate; but those of paying it out by the legatee. *Re Cawthorne*, 12 Beav. 56; *Re Jones*, 3 Drew. 679; unless the fund paid in has been completely severed and appropriated; then the costs of payment into court must come out of the fund itself. *Re Lorimer*, 12 Beav. 521. But the court, by the second section of the act, has jurisdiction to order a trustee to pay the costs of a petition for payment out of court of a fund paid in by him under the act; *Re Woodburn's Will*, 1 De G. & J. 333; and will exercise it where the trustees have acted vexatiously or unreasonably. S. C. See, also, *Re Cater's Trusts*, 25 Beav. 361; *Re Knight's Trusts*, 27 Beav. 45; *Re Folignos' Mortgage*, 32 Beav. 131; *Re Leake's*

*accountant general of the high court of chancery, into the bank of England, to the account of such accountant general in the matter of the particular trust (describing the same by the names of the parties, as accurately as may be, for the purpose of distinguishing it (*l*), in trust to attend the orders of the said court; and that all trustees or other persons having any annuities or stocks standing in their names in the books of the Governor and Company of the Bank of England or of the East India Company, or South Sea Company, or any government or parliamentary securities standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trust whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said accountant general, with his privity, in the matter of the particular trust (describing the same as aforesaid), in trust to attend the orders of the said court; and in every such case the receipt of one of the cashiers of the said bank for the money so paid, or, in the case of stocks or securities, the certificate of the proper officer, of the transfer or deposit of such stocks or securities, shall be a sufficient discharge to such trustees or other persons for the money so paid, or the stocks or securities so transferred or deposited."

Receipt of bank cashier, or certificate of proper officer, to be sufficient discharge.

II. "Such orders as shall seem fit shall be from time to *time made by the high court of chancery in respect of the trust moneys, stocks, or securities so paid in, transferred, and deposited as aforesaid, and for the investment and payment of any such moneys, or of any dividends or interest on any such stocks or securities, and for the transfer and delivery out of any such stocks and securities and for the administration of any such trusts generally, upon a petition to be presented in a summary way to the lord chancellor or the master of the rolls, (*m*) with-

Court of chancery to make orders on petition, without bill, for application of trust moneys and administration of trust.

Trusts, *Ib.* 135. But the court will not make the rule too stringent in cases of this kind where trustees have acted *bonâ fide*. *Re Wyll's Trusts*, 28 Beav. 458; *Re Brocklesby*, 29 Beav. 652, accord. If a trustee files a bill in a case in which he ought to have paid the fund into court under this act, he will be allowed only such costs as he would have been entitled to under the act. *Wells v. Malbon*, 31

Beav. 48; *Re Allen's Will*, Kay, App. 51; *Re Dalton*, 1 De G., M. & G. 265.

(*l*) Where executors paid money into court to an account headed "In the matter of the trusts of the will of S. J.," the court held that the account was too general to enable it to act under this statute. *In re Joseph's Will*, 11 Beav. 625.

(*m*) In all cases where the trust fund does not exceed three hundred pounds

out bill, by such party or parties, as to the court shall appear to be competent and necessary in that behalf, and service of such petition shall be made upon such person or persons as the court shall see fit and direct; and every order made upon any such petition shall have the same authority and effect, and shall be enforced and subject to rehearing and appeal, in the same manner as if the same had been made in a suit regularly instituted in the court; and if it shall appear that any such trust funds cannot be safely distributed without the institution of one or more suit or suits, the lord chancellor or master of the rolls may direct any such suit or suits to be instituted."

IV. "The lord chancellor, with the assistance of the master of the rolls or one of the vice chancellors, shall have power and is hereby authorized to make such orders as from time to time shall seem necessary for better carrying the provisions of this act into effect." (n)

Lord chancellor, with master of the rolls, &c. may make general orders.

If an executor, desirous of acting under this statute, pays into court too large a sum, as for instance where after paying a residue he discovers that there are debts still due from the estate, he will have a right to get back the excess; and where in a case of this description application was made by an executor, with the consent of the parties beneficially * interested, for repayment of *the whole fund*, Knight Bruce V. C. ordered the fund to be paid out to the executor, upon his undertaking to administer it according to the trusts of the will. (o)

Remedy for executor who has paid too large a sum into court.

By stat. 12 & 13 Vict. c. 74 (being an extension of the statute last cited), if it should appear to the court upon petition that any moneys, annuities, stocks, or securities are vested in any persons as trustees, executors, or administrators, or otherwise within the meaning of stat. 10 & 11 Vict. c. 96, and that the major part of such persons are desirous of transferring, &c. the same to the accountant general under the provisions of that act, but that for any reason the concurrence of the other or others of them cannot

12 & 13 Vict. c. 74. Court may upon application by majority of trustees order payments or transfer into court.

cash or three hundred pounds stock, the application should be made in chambers. Cons. Orders, xxxv. 1. For proceedings under the act generally, see Order xli. 1-9.

(o) Ex parte Tournay, 3 De G. & Sm. 677. The reader is referred to Morgan's Chancery Acts and Orders for the numerous cases which have been decided upon this statute.

(n) *Supra*, note (m).

be had, the court may order such transfer, &c. to be made by the major part of such persons without the concurrence of the rest; and where any such funds shall be deposited with any banker, broker, or other depositary, the court may make such order for the payment of such funds to the major part of such trustees, executors, &c. for the purpose of being paid to the accountant general as to the court shall seem meet, and all payments so made shall be as valid as if they had been made on the authority of all the persons entitled to the fund.

By stat. 13 & 14 Vict. c. 35, s. 1, it is enacted, "That it shall
 13 & 14
 Vict. c. 35,
 sect. 1.
 Executors
 may con-
 cur in spe-
 cial case: be lawful for persons interested, or claiming to be inter-
 ested, in any question cognizable in the court of chancery
 as to the construction of any act of parliament, will,
 deed, or other instrument in writing, or any article,
 clause, matter, or thing therein contained, or as to the
 title, or evidence of title, to any real or personal estate contracted
 to be sold or otherwise dealt with, or as to the parties to, or the form
 of any deed or instrument for carrying any such contract into
 effect, or as to any other matter falling within the original juris-
 diction of the said court as a court of equity, or made * subject to
 the jurisdiction or authority of the said court by any statute not
 being one of the statutes relating to bankrupts, and including
 among such persons all lunatics, married women and infants, in
 the manner and under the restrictions hereinafter contained, to
 concur in stating such questions in the form of a special case for
 the opinion of the said court; and it shall also be lawful for all
 executors, administrators, and trustees to concur in such case."

Sect. 15. "That every executor, administrator, trustee, or other
 shall be in- persons making any payment, or doing any act in con-
 demnified formity with the declaration contained in any decree
 by declara- made upon a special case, shall in all respects be as fully
 tion in de- and effectually protected and indemnified by such dec-
 cree. laration, as if such payment had been made or act done under or
 in pursuance of the express order of the said court, made in a suit
 between the same parties instituted by bill, save only as to any
 rights or claims of any person in respect of matters not deter-
 mined by such declaration."

If the executor finds the affairs of the testator so complicated as
 13 & 14
 Vict. c. 35,
 s. 19. to render the administering of the estate unsafe, he may
 obtain a decree against any one or more of the legatees

or next of kin, for the administration of the estate; (*p*) or he may avail himself of the 19th section of the statute last cited, whereby it is enacted, "that it shall be lawful for the said court, upon the application of the executors or administrators of any deceased person, by order to be made upon motion or petition of course, (*q*) and to be in the form or to the effect set forth in the schedule thereto, with such variations as circumstances may require, to refer it to one of the masters (*r*) of the said court, to take an account of the debts and liabilities affecting the personal estate of such deceased * person, and to report thereon. Provided, always, that no such order shall be made until the expiration of one year next after the death of such deceased person, (*s*) or pending any proceedings to administer the estate of such person, and that in case at any time after the making of such order, any decree or order for administering the estate of such deceased person shall be made, it shall be lawful for the said court, by such decree or order, to stay or suspend the proceedings under such order of course, on such terms and conditions, if any, as to the said court shall seem just."

Executors,
&c. may
apply to
the court
for an
order to
take ac-
count of
debts and
liabilities.

The three following sections of this act prescribe the mode of taking objection to the master's report, by way of motion to the court; the proceedings of the court on such motion; and direct

(*p*) 15 & 16 Vict. c. 86, sect. 42, rule 6.

(*q*) Or by a judge at chambers upon summons. 23 & 24 Vict. c. 38, s. 14.

(*r*) The accounts under this enactment must now be taken by the master of the rolls or one of the vice chancellors. See 15 & 16 Vict. c. 80, sect. 36. And the form of the order in the schedule must be varied accordingly.

(*s*) By 23 & 24 Vict. c. 38, s. 14, the order may be made immediately after probate granted. And by the same section, "After any such order shall have been made, the said court or judge may, on the application of the executors or administrators, by motion or summons, restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having, or claiming to have, any demand upon the

estate of the deceased, by reason of any debt or liability due from the estate of the deceased, upon such notice and terms and conditions (if any) as to the said court or judge shall seem just; and the judge, in taking an account of debts and liabilities pursuant to any such order shall, on the application of the executors or administrators, be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuance to any such order shall be certified by his chief clerk, without any adjudication thereon; and any notices for creditors to come in which may be published in pursuance of any such order shall have the same force and effect as if such notices had been given by the executors or administrators in pursuance of the 29th section of 22 & 23 Vict. c. 35."

that if debts or certain liabilities are allowed by the court, and are not paid or provided for by appropriation, to the satisfaction of the person who has established such liability, an order may be made by the court for payment of accounts.

Section 23. "In case any contingent liability shall be allowed by the said report, or by the said court, it shall be *lawful for the said court by order, to be made upon the application of the executors or administrators, by motion or petition, on notice to the person who may have established such contingent liability, to order such sum of money, part of the estate of the deceased person, as to the said court shall seem just, to be set apart and appropriated for answering such contingent liability, and to give such directions as the said court shall think fit touching the payment of such sum of money into court, and the investment thereof, and the payment, application, or accumulation of the interest or dividends thereof in the mean time and until the same shall be required to answer such liability, and when such liability shall be ascertained or determined, to give such directions as to the payment of such sums out of court as the said court shall deem right. Provided, always, that no order to be made as aforesaid shall in any manner bind the assets so appropriated as against the persons entitled to the estate of the deceased subject to the contingent liability; and any person interested in such appropriate assets may apply to the court touching the same, as he may be advised."

Sect. 24. "After the filing of such report as aforesaid, it shall be lawful for the said court, upon the application of the executors or administrators of the deceased, by order, to be made on motion, to restrain by injunction any proceedings at law against them by any person having or claiming to have any demand upon the estate of the deceased by reason of any debt or liability, other than the persons who may have established contingent liabilities under the said order, for which no appropriation may have been made."

Sect. 25. "In case no debt or liability, or no debt or liability other than a contingent liability, shall have been allowed as aforesaid, or in case any debt or liability other than as aforesaid, shall have been allowed as aforesaid, then after the same shall have been paid or provided for by appropriation as aforesaid, all payments made by the executors or

administrators or any of them, on account of *the estate of the deceased person, and all dispositions of such assets made by them or any of them on account of such estate, shall, as against all persons having or claiming to have any demand upon such estate, by reason of any debt or liability, other than persons who may have established under the said order any contingent liability for which no such appropriation as aforesaid may have been made, be as good and effectual as if the same had been made under a decree of the said court. Provided, always, that nothing herein contained shall in any manner affect or prejudice the rights of any creditor or other person having any demand or claim upon the estate of the deceased, against any assets so paid or disposed of, or against the persons to whom such payment or disposition may have been made, or against any assets appropriated under the provisions of this act, and the appropriation of which, if made under a decree of the said court in a suit to which he was not a party, would not have been binding upon him."

By 22 & 23 Vict. c. 35, s. 29, it is enacted, that "where an executor or administrator shall have given such or the like notices as in the opinion of the court in which such executor or administrator is sought to be charged, would have been given by the court of chancery in an administration suit, (*t*) for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, (*t*¹) amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as * the case may be ; but nothing in the present act contained shall prej-

22 & 23
Vict. c. 35,
s. 29.

Executors,
&c. may
distribute
assets after
due notice
to credit-
ors and
others to
send in
claims.

(*t*) See Cons. Orders, xxxv. 35-37.

(*t*¹) [When it shall be made to appear to any probate court, in Massachusetts, that a partial distribution of the personal property of any estate in process of set-

tlement therein, can be made to those entitled to it, without detriment to the estate, the court may, after notice, order such partial distribution to be made. St. Mass. 1873, c. 224, § 2.]

[1908] [1909]

udice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively." (*t*²)

And by section 30 of the last cited act, it is provided, that "any trustee, executor, or administrator shall be at liberty without the institution of a suit, to apply by petition to any judge of the high court of chancery, or by summons upon a written statement to any such judge at chambers, for the opinion, advice, or direction of such judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the said judge shall think expedient; and the trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of the said application. . Provided, nevertheless, that this act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice,

(*t*²) [In Massachusetts, if the executor or administrator who has given the prescribed notice of his appointment, does not within one year thereafter have notice of demands against the estate of the deceased which will authorize him to represent the estate insolvent, he may, after the expiration of said year, proceed to pay the debts due from the estate; and he shall not be personally liable to any creditor in consequence of any such payments made before notice of his demand. Genl. Sts. of Mass. c. 97, § 17. On proving such payments to the extent of the whole of the assets, he is to be discharged. § 18. As to the mode in which an executor or administrator is to proceed when he has not paid away the entire assets in discharge of claims of which he has notice within the year, and he has notice of other claims made upon the estate, see § 19. If an administrator has, within a year after his appointment, paid a claim against

the estate of his intestate, in the honest belief that the estate was solvent, and the estate has been subsequently declared insolvent, and after due proceedings a dividend has been ordered to be paid from all the assets then available, the administrator may at once commence an action to recover back the excess so paid, above the amount of the dividend, although there may be some farther assets which may at some future time be realized; and the statute of limitations will begin to run against the claim of the administrator from the date when the dividend was ordered. *Richards v. Nightingale*, 9 Allen, 149. See, also, to the same effect, *Heard v. Drake*, 4 Gray, 514; *Walker v. Hill*, 17 Mass. 380; *Walker v. Bradley*, 3 Pick. 261; *Bliss v. Lee*, 17 Pick. 83; *ante*, 1036, note (*h*), 1862, note (*r*²); *Clark v. Williams*, 70 N. Car. 679. But see *Colegrove v. Robinson*, 11 Met. 238.]

or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud, or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the judge to whom the said application shall be made." (*t*⁸)

23 & 24 Vict. c. 38, s. 9, prescribes the form of applying for advice of the judge under the above section. (*u*)

It has been held that the court will not, upon a petition presented by a trustee or executor under this enactment, construe an instrument or make any order affecting the rights of parties. Such petitions should relate only to the *management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested. (*x*)

There has already been occasion to show (*y*) that a suit in equity, commenced by the deceased, may be continued on the part of his executor or administrator, by an order Order of revivor. to revive merely.

In case of a suit by co-executors, the proceedings do not abate by the death of one of them; because the whole of his interest survives to the others. The suit may, therefore, be continued by them, without revivor. (*z*) So where one of the plaintiffs in a

(*t*⁸) [Executors and administrators, by bill in the nature of a bill of interpleader, may take the advice of a court of equity upon questions connected with the discharge of their duties, as such executors and administrators; but the interposition of the court in such cases is discretionary, and will not be exercised except in matters of importance. *Crosby v. Mason*, 32 Conn. 482; *Wheeler v. Perry*, 18 N. H. 307; *Goodhue v. Clark*, 37 N. H. 525; *Annin v. Vandoren*, 14 N. J. Eq. 135; *Deering v. Tucker*, 55 Maine, 284; *Woodruff v. Cook*, 47 Barb. 304; *Kearney v. Macomb*, 1 C. E. Green, 189; *Treadwell v. Cordis*, 5 Gray, 341; *Hooper v. Hooper*, 9 Cush. 122, 127; *Drury v. Natick*, 10 Allen, 169, 175; *Andrews v. Bishop*, 5 Allen, 430; *Dimmock v. Bixby*, 20 Pick. 368, 374; *Horah v. Horah*, 1 Wins. (N. Car.) Eq. 107. For a case where an administrator was permitted to maintain a

bill for instructions, see *Stevens v. Warren*, 101 Mass. 564, 565. An administrator cannot resort to a court of equity as a matter of course to obtain instructions in reference to the settlement of his intestate's estate, but only where there are special circumstances involved in such settlement. *McNiel v. McNiel*, 36 Ala. 109; *Park v. Park*, 36 Ala. 132; *Beers v. Strohecker*, 21 Geo. 442; *Pitkin v. Pitkin*, 7 Conn. 315.]

(*u*) See, also, Orders of 20th March, 1860.

(*x*) *Re Lorenz*, 1 Dr. & Sm. 401, per Kindersley V. C. See, also, *Re Hooper's Will*, 7 Jur. N. S. 595.

(*y*) *Ante*, 890; stat. 15 & 16 Vict. c. 86, s. 52. See the cases on this section collected in *Morgan's Chancery Acts and Orders*, p. 219. See, also, *Cons. Orders*, xxxii.

(*z*) *Toller*, 497.

creditor's suit dies, his death does not abate the suit; (a) though if he died after the decree, his personal representative may obtain an order to revive. (b)

But, generally, where one of several plaintiffs dies, unless his interest survives to the others, the suit wholly abates; (c) and it may be revived by his representative, either in conjunction with them, or separately, but making them parties. So one of the survivors may, if the others refuse to join, file a bill of revivor alone, making the others, and the representatives of the deceased, defendants.

By 20 & 21 Vict. c. 77, s. 76, the revocation of a temporary
20 & 21
 Vict. c. 77,
 s. 76. * grant of administration is not to prejudice any actions or suits already commenced by or against an administrator so appointed.

Suit by one
 executor
 against
 another. Although an executor cannot bring any action at law against a co-executor, (d) yet, in a court of equity, one executor may sue another. (e) If one of the executors

(a) *Boddy v. Kent*, 1 Meriv. 364. As to death of a co-plaintiff residuary legatee since 15 & 16 Vict. c. 86, s. 42, rule 1, see *Hinde v. Morton*, 2 Hemm. & M. 368; *post*, 2011, note (v).

(b) *Burney v. Morgan*, 1 Sim. & Stu. 358. *Quære*, if before a decree. *Ib.* After a decree in a creditor's suit and death of the plaintiff without leaving a personal representative, the court will not allow the proceedings to continue upon the motion of the defendants, the accounting parties, though the master of the rolls said, that if a creditor were to apply, he would allow him to carry on the suit instituted for his benefit, since after decree all creditors are as plaintiffs. *Johnson v. Hammersley*, 24 Beav. 498.

(c) *Cave v. Cork*, 2 Y. & Coll. C. C. 130.

(d) *Ante*, 956.

(e) *Allen v. Story*, Toth. 150; *Peake v. Ledger*, 8 Hare, 313; [*Case's Appeal*, 35 Conn. 117. But a court of equity will not interfere between co-executors, unless it appears to be imperatively required for the purposes of justice. *Rogers v. Moor*, 1 Root, 472; *Beach v. Natar*, 9 Conn. 182; *Stiver v. Stiver*, 8 Ohio, 217; *Wurts v.*

Jenkins, 11 Barb. 546. One executor in Maryland cannot maintain a bill in equity against his co-executor to compel him to account for and pay over to him certain claims alleged to be due from the defendant, to the estate of their testator. *Beall v. Hilliary*, 1 Md. 186. See *Lawrence v. Lawrence*, 6 Litt. (Ky.) 123. But it was held in *Wood v. Brown*, 34 N. Y. 337, that one executor may maintain a suit in equity to call his co-executor to account. The creditors, legatees, and next of kin are not necessary parties, except in case of a final accounting. So one executor may maintain a suit against his co-executor to revive a suit against such co-executor for foreclosure of a mortgage commenced by the testator in his lifetime. *McGregor v. McGregor*, 35 N. Y. 218. Where one of two administrators of an estate directed a debtor thereof to retain the money due from him, and not to pay it to the other administrator, and the debtor complied with such direction, the other administrator brought an action to recover the debt, in which the co-administrator, refusing to join as co-plaintiff, was made defendant. It was thereupon held that the debtor could not set up the direc-

of a mortgagee be himself the mortgagor, the bill by the co-executors should not be for a foreclosure, but for a sale. (*f*)

There has already been occasion to show that an executor may file a bill before probate. (*g*) And so may an admin- ^{Form of bill by executor.}istrator before he has taken out letters of administration. (*h*) And the subsequent probate or letters will make the bill a good one, if obtained at any time before hearing. (*i*) Nevertheless, the bill must allege that the executor or administrator has obtained probate or letters. (*k*) So, an executor, bringing a *scire facias* to revive a decree, must show that he has proved the will. (*l*) However, it is sufficient for the plaintiff to allege by the bill that he has duly proved the will or taken out administration, without mentioning in what court. (*m*)

If there are several executors, they must all sue, though one of them be an infant. (*n*) But where one executor of ^{Parties.}several has alone proved, it has been decided that he may sue without making the other executors parties, although they have not renounced. (*o*)

* A bill is not demurrable, on the ground that the legatees of a testator join with the executor in suing for a debt due to his estate. (*p*)

By stat. 15 & 16 Vict. c. 86, s. 42, rule 6, it is enacted that "any executor, administrator, or trustee may obtain a decree against any one legatee, next of kin, or *cestui que trust* for the administration of the estate or the execution of the trusts."

tion not to pay as a bar to the action. The administrator who gave it did so in violation of his duty, and the administrator suing was entitled to bring the action and join the other as defendant. *Strever v. Feltman*, 1 Thomp. & C. (N. Y.) 277.]

(*f*) *Lucas v. Seale*, 2 Atk. 56.

(*g*) *Ante*, 308.

(*h*) *Ante*, 405.

(*i*) *Ante*, 308. See *Simons v. Milman*, 2 Sim. 241.

(*k*) *Humphreys v. Ingledon*, 1 P. Wms. 753; S. C. Dick. 38; [*Trapnall v. Burton*, 24 Ark. 371; *Pelletreau v. Rathbone*, 1 N. J. Eq. 331.]

(*l*) *Comber's case*, 1 P. Wms. 766.

(*m*) 1 P. Wms. 753; *Stone v. Baker*, 1 P. Wms. 753 (in a note by the reporter, who adds a *quære*, whether there is any dif-

ference, as to this point, between an administration and an executorship). But see *Jossaume v. Abbott*, 15 Sim. 127. [As to the facts necessary to be set forth in a bill to show that the plaintiff has a right to sue as executor, or that the defendant is liable as such, see *Evans v. Evans*, 23 N. J. Eq. 71.]

(*n*) 16 Vin. Abr. 251, tit. Parties, B. pl. 20.

(*o*) *Davies v. Williams*, 1 Sim. 5. In this case the vice chancellor is reported to have said that where one executor has alone proved, he may sue in equity, as well as at law, without naming the others as parties. But see *ante*, 1867, and *Kilby v. Stanton*, 2 Y. & Jerv. 77.

(*p*) *Rhodes v. Warburton*, 6 Sim. 617.

A plea that the plaintiff, who entitles himself as executor or administrator, is not executor or administrator, though a negative plea, is good in abatement of the suit. (*q*) So where a plaintiff entitled himself as administrator of an intestate, and the defendant pleaded that the supposed intestate was living, the plea was allowed. (*r*) But an affirmative plea, that the probate is insufficiently stamped, has been held bad; for this defence may be shown under a plea that the plaintiff is not executor. (*s*)

In *Moons v. Bernales*, (*t*) it was held that production by a plaintiff, suing as administrator to A., of the letters of administration, was not *prima facie* evidence of A.'s death, (*u*) but at the hearing, liberty was given to the plaintiff to exhibit interrogatories to prove the death, and the cause permitted to stand over for that purpose. (*x*)

Where a bill was brought to be relieved touching a debt due to the plaintiff as executor, the defendant pleaded an outlawry. *outlawry of the plaintiff in bar; but the plea was overruled, the suit being *in auter droit*. (*y*)

The statute of limitations may be set up in resistance to proceedings by way of revivor, if the executor or administrator does not proceed within six years after the abatement of a suit, provided there has been no decree; (*z*) for a decree being in the nature of a judgment, the statute of limitations cannot be applied to it. (*a*) If an executor or administrator, trustee for an infant, neglects to sue within six years, the statute of limitations shall bind the infant. (*b*)

(*q*) *Winn v. Fletcher*, 1 Vern. 473. Mitf. Pl. 230, 4th ed.; *Fry v. Richardson*, 10 Sim. 475; *Cooke v. Gittings*, 21 Beav. 497; [*Clark v. Pishon*, 31 Maine, 503.]

(*r*) *Ord v. Huddleston*, Dick. 510; S. C. cited 1 Cox, 198.

(*s*) *Roberts v. Madocks*, 16 Sim. 55.

(*t*) 1 Russ. 301.

(*u*) See *ante*, 561.

(*x*) See *Hood v. Pimm*, 4 Sim. 101. It may here be observed, that where money is ordered to be paid to A. or his representatives (the constant course upon payment to creditors) the mere production of the probate is not sufficient to enable the representative to obtain payment.

Proof of the death is now required, and that the testator was the party in the cause. *Clayton v. Gresham*, 10 Ves. 289.

(*y*) *Killegrew v. Killegrew*, 1 Vern. 168.

See *ante*, 235.

(*z*) *Hollingshead's case*, 1 P. Wms. 742; Mitf. Pl. 272, 273, 4th ed.

(*a*) *Supra*, note (*z*). [The balance of a claim proved and allowed, under a commission of insolvency, against the estate of a deceased insolvent person, on which a dividend has been paid, is not within the statute of limitations. *Bancroft v. Andrews*, 6 Cush. 493, 495.]

(*b*) *Wych v. East India Company*, 3 P. Wms. 309.

As to set-off; no rule is better established than that demands due in different rights cannot be set off against each other. Therefore, a debt due from an executor cannot ^{set-off.} be set off against a debt due to his testator. Accordingly, where the plaintiff was residuary legatee and surviving executrix of her husband, to whom A. and a bankrupt had given a joint bond, the other obligor being dead, and the plaintiff was indebted upon her private account to the bankrupt, Lord Hardwicke refused an injunction to a suit upon the bond, saying, that the debts were in different rights, and that there was no mutual credit. (c)

But it has already (d) been pointed out that a court of equity, in regulating the right of set-off, will regard a debt or demand as due in the right of him who is beneficially entitled to it.

It has appeared above (e) that an executor or administrator availing himself of the stat. 13 & 14 Vict. c. 35, s. 19, may, after the order shall have been made, apply to the court to restrain or suspend, until the account directed by *such order shall have been taken, any proceedings at law against him by claimants on the estate of the deceased. Likewise, when the court has pronounced a decree (or made an order under stat. 15 & 16 Vict. c. 86 (f)), for an account and payment of debts or legacies, under which all creditors or legatees may claim, the executor or administrator may obtain an injunction to restrain proceedings by a separate creditor or legatee, either at law or equity; as the just administration of the assets would be greatly embarrassed by such proceeding. (g)

When an injunction can be obtained in a creditor's suit to restrain proceedings at law, &c.

So the court will restrain a person, who is in the character of a creditor, from proceeding at law, although he sues for unascertained damages, as upon breaches of a covenant to repair. (h)

(c) *Bishop v. Church*, 3 Atk. 691. See also, *Money Penny v. Bristow*, 2 Russ. & My. 117, and *ante*, 1304.

(d) *Ante*, 1878, 1879.

(e) *Ante*, 1906, note (s.) See, also, stat. 13 & 14 Vict. c. 35, s. 24, *ante*, 1907.

(f) See *post*, 2007, bk. II. ch. II.

(g) *Mitf. Pl.* 168, 4th ed.; *Drewry v. Thacker*, 3 Swanst. 541, 544; *Clarke v. Ormonde*, Jacob, 123, 124; *Hayward v. Constable*, 3 Y. & Coll. 43; *Whitaker v.*

Wright, 2 Hare, 310; [*Pennell v. Roy*, 3 De G., M. & G. (Am. ed.) 126, note (1) and cases cited; *Updike v. Doyle*, 7 R. I. 460; *Thompson v. Brown*, 4 John. Ch. 642; *Hazen v. Durling*, 1 Green Ch. 138.] So, after an administration order, a legatee will be restrained from proceeding to recover his legacy in the county court. *Ratcliffe v. Winch*, 16 Beav. 576.

(h) *Sutton v. Mashiter*, 2 Sim. 513.

And the rule extends to proceedings in Scotland, or any foreign country. (i)

Formerly the course was for the executor to file a bill, against the creditor suing at law, to obtain the injunction. However, according to the modern practice, it is unnecessary to file a separate bill for that purpose, but an injunction may be applied for, in the existing suit, by a motion on behalf of the plaintiff, or the defendant, the executor or administrator, that the creditor may be restrained from *proceeding at law, and be directed to come in and prove his debt with the other creditors of the testator or intestate. (k)

It must be observed, however, that courts of equity will not restrain proceedings of creditors at law against executors to obtain payment of debts, merely on the bill filed, *until there is a decree* (or an administration order, which has the effect of a decree). (l) But from the moment of the decree, the court proceeds on the ground that the decree is a judgment in favor of all the creditors, (m) and that they ought all to be paid according to their priorities as they then stand; and that the court cannot execute its own decree, if it permits courts of law to alter the course of payment. (n) The court, however, cannot interfere unless there is in existence a decree under which the creditor has a *present right* to go in and prove his debt. (o)

(i) *Graham v. Maxwell*, 1 Mac. & G. 320; *Baillie v. Baillie*, L. R. 5 Eq. Cas. 71; *Maclaren v. Stainton*, 16 Beav. 279. 175.]

In the case last cited, a Scotch corporation, trading in England, and having warehouses and goods, and an office there, was restrained from proceeding, in Scotland, against the testator's Scotch assets. But this decision was reserved in the house of lords (*dissentiente* Lord St. Leonards) upon the ground that as the Scotch corporation had not come in under the administration decree, they were not precluded from proceeding against the Scotch assets of the testator in the courts of that country, and that the circumstance of their having property and an agent in England did not affect their rights in this respect. 5 H. L. Cas. 416. [See *Pennell v. Roy*, 3 De G., M. & G. (Am. ed.) 126, note (1); 2 Dan. Ch. Pr. (4th Am. ed.) 1614, 1615; *Hope v. Carnegie*, L. R. 1 Ch. App.

(k) *Paxton v. Douglas*, 8 Ves. 520; *Perry v. Phelps*, 10 Ves. 39, 40. A legatee may make the application. *Clarke v. Ormonde, Jacob*, 122.

(l) *Rush v. Higgs*, 4 Ves. 638, and note (a); *Teague v. Richards*, 11 Sim. 46.

(m) *Pennell v. Roy*, 3 De G., M. & G. 137, 138, by Lord Justice Turner.

(n) *Largan v. Bowen*, 1 Sch. & Lef. 299.

(o) *Rankin v. Harwood*, 2 Phill. C. C. 22; 5 Hare, 215. The court of equity restrains the proceedings at law only on the principle that the creditor is enabled to bring into equity all his legal rights. *Whitaker v. Wright*, 2 Hare, 310. Where a creditor had recovered judgment against the testator and sued out a *fi. fa.* thereon in his lifetime, and on the day after his death

It is obvious, that, by means of this practice, an executor or administrator may compel the creditors of the deceased to take an equal distribution of the assets, (*o*¹) and courts of equity, accordingly, of late years allowed, for this purpose, friendly bills to be filed against executors or administrators, *i. e.* suits by them in the name of a creditor against themselves. * The principle on which this sort of suit was allowed, was that as executors have great powers of preference at law, (*p*) the courts did not disapprove of their coming in the shape of an application by a creditor to give a judgment to all the creditors, and to secure a distribution of the assets without preference to any. (*q*) Considerable incon-

placed the writ in the sheriff's hands an injunction to restrain execution was refused, on the ground that the creditor had acquired a right to the goods by virtue of the writ of *fi. fa.*, from the teste of the writ (see *post*, bk. II. ch. I.), and therefore paramount to the right of the executor. *Ran-kin v. Harwood*, 5 Hare, 215. See, also, *Marriage v. Skiggs*, 4 De G. & J. 4; *Fowler v. Roberts*, 2 Giff. 226. [When the estate has been represented to be insolvent, the court of chancery will enjoin an execution subsequently sued out upon a judgment against an executor or administrator, and it is no answer to a bill to enjoin such execution, that the representation of insolvency was obtained by fraud. *Neibert v. Withers*, 1 Sm. & M. Ch. 598.]

(*o*¹) [This result is secured in Massachusetts by the appointment of commissioners of insolvency, or by the action of the court itself in examining and determining claims and their amount, when it appears to the probate court from the representation of an executor or administrator, that the estate of the deceased will probably be insufficient for the payment of his debts. Genl. Sts. c. 99, § 2. The method of proceeding appears in the other sections of this chapter (99), and in Stats. Mass. 1863, c. 217, 1868, c. 327, 1873, c. 252; *Aiken v. Morse*, 104 Mass. 277. The usual course is for the executor or administrator to exhibit a list of debts, which have come to his knowledge or which he has reason to believe are due from the deceased; and

this statement is verified by his oath. If the amount of those debts exceeds the value of the estate, and if the judge has no reason to doubt the truth of the statement, he awards the commission; *Jackson J. in Walker v. Hill*, 17 Mass. 386; or himself examines and determines their validity and amount under st. 1873, c. 252. No action shall be maintained against an executor or administrator after an estate is represented insolvent, unless for a demand entitled to a preference and which would not be affected by the insolvency of the estate, or unless the assets prove more than sufficient to pay all the debts allowed by the commissioners. If the estate is represented insolvent while an action is pending for any demand that is not entitled to such preference, the action may be discontinued without payment of costs; or, if the demand is disputed, the action may be tried and determined and judgment rendered thereon as in an action at law prosecuted in the usual manner except that no execution shall be awarded against the executor or administrator for a debt found due to the claimant; or the action may be continued without costs until it appears whether the estate is insolvent, and if not insolvent the plaintiff may prosecute the action as if no such representation had been made. Genl. Sts. Mass. c. 99, § 20.]

(*p*) See *ante*, 1032 *et seq.*

(*q*) *Gilpin v. Lady Southampton*, 18 Ves. 469. In *Brady v. Sheil*, 1 Campb. 147, it was stated on behalf of the defend-

venience, however, arose from the practice as it at first prevailed; the executor frequently applying for the purpose, not of preventing a preference, but of preventing the payment of any creditor, and keeping the assets himself. Lord Eldon, therefore, introduced the rule, that, where the answer does not state what the assets are, the executor shall be called upon to state them by affidavit, so as to enable the court, if, in its discretion, it should think fit, to order him to pay in the balance in his hands. (r)

*The plaintiff at law is entitled, upon the injunction being granted, to have his costs of the action paid by the executor, up to the time when he had notice of the decree. (s) And if the cred-

ant, an executor, that at a meeting of creditors of a deceased insolvent, called by the executor, they agreed to a ratable distribution, on the faith of which he executed a deed of assignment of all the assets which had come to his hands for the benefit of the creditors. And Sir James Mansfield seemed to think that this, if made out by evidence, would be a good defence. And the learned judge said that he wished it were more generally known (for he believed that lawyers in the court of K. B. were not aware of it) that through the medium of a court of equity, the creditors of a deceased insolvent may always be compelled to take an equal distribution of the assets. It was only necessary for a friendly bill to be filed against the executor or administrator, to account; after which the chancellor would enjoin any of the creditors from proceeding at law. It would appear from the expressions of Lawrence J. in *Meux v. Howell*, 4 East, 10, that the same object might be gained by the executor confessing a judgment to a trustee, to a sufficient amount to cover the assets, and afterwards pleading this judgment to an action by a litigious creditor. But it is clear, from the subsequent decision of *Tolputt v. Wells*, 1 M. & Sel. 395, that such a course is impracticable; for it was held in that case, that such a judgment as that proposed could not be pleaded in bar to the action. See *ante*, 1035.

(r) *Gilpin v. Lady Southampton*, 18

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Ves. 469; *Paxton v. Douglas*, 8 *Ves.* 520; *Drewry v. Thacker*, 3 *Swanst.* 546; *Clarke v. Ormonde*, Jacob, 125; *Vernon v. Thellusson*, 1 *Phill. C. C.* 466, 472. But see *Ratcliffe v. Winch*, 16 *Beav.* 576, 577. In *Macrae v. Smith*, 2 *K. & Johns.* 411, the application was to stay a creditor's suit, because on a decree obtained in an administration suit which had been subsequently instituted by two of the executors against the third, Wood V. C. was of the opinion that a decree obtained by an executor for administration against his co-executors was a decree for the benefit of all the creditors of the testator, and added that as, upon an application for an injunction to stay proceedings at law by a creditor, the court would order the executor to make an affidavit of the amount of assets in his possession, and to pay the balance into court, he could not see why a creditor in equity was not entitled to the same relief.

(s) *Dyer v. Kearsley*, 2 *Meriv.* 483, note to *Terrewest v. Featherby*; *Paxton v. Douglas*, 8 *Ves.* 520; *Ratcliffe v. Winch*, 16 *Beav.* 576. In *Drewry v. Thacker*, 3 *Swanst.* 541, Lord Eldon said that the usual form in which the order for the injunction was drawn (*i. e.* "on payment of costs") was improper; inasmuch as the parties entitled to the injunction, if they were required to pay costs as a preliminary, might, from the situation of the assets, be unable to obtain it in time.

itor commences his action at law before bill filed, and then discontinues it, and comes in under the decree, he will be entitled to prove his costs at law, in addition to his debt. (*t*) He is also, it should seem, entitled to the costs of the motion to restrain him from suing at law. (*u*) But he shall not be allowed the costs of further proceedings at law after actual notice of the decree, (*x*) nor in such case his costs of the motion to restrain his proceedings. (*y*) If, however, the executor take any steps in the action after the * plaintiff at law has had notice of the decree, the latter will be allowed all his costs at law and also those of the motion for the injunction. (*z*)

With respect to the time within which the injunction should be applied for, it was observed by Lord Lyndhurst, (*a*) that any delay in the application before judgment will, in most cases, properly resolve itself into a mere question of costs.

If, after a decree to account, the executor permits the creditors to proceed at law, he will be responsible ; and if the creditors take property of the testator in execution, the executor will not be able to charge it to the estate ; he may be allowed to stand in the place of those creditors against the estate, but he cannot do more. (*b*) But if the creditors obtain judgment after notice of a decree, and levy on the testator's property, the court of equity will compel them to restore it. (*c*)

Where the executor, in an action at law against him by a creditor of the deceased, has pleaded according to the truth of the case, he is clearly entitled, when the assets are taken from him and administered by the court of equity, to all the protection which that court can give him against any personal liability in respect of the judgment at law. (*d*)

(*t*) *Goate v. Fryer*, 3 Bro. C. C. 23 ; S. C. 2 Cox, 201.

(*u*) *Jones v. Jones*, 5 Sim. 678. But see *Anon.* 2 Sim. & Stu. 424.

(*x*) *Paxton v. Douglas*, 8 Ves. 521 ; *Curre v. Bowyer*, 3 Madd. 456 ; *Jones v. Brain*, 2 Y. & Coll. C. C. 170.

(*y*) 3 Madd. 456 ; 2 Y. & Coll. C. C. 170. See *Hayward v. Constable*, 2 Y. & Coll. 43 ; *Moore v. Prior*, Ib. 375. He may be ordered to pay these costs, if, after bringing in his claim under the decree, he proceeds with his own suit ; *Beauchamp v.*

Lord Huntley, Jacob, 546 ; *Gardner v. Garrett*, 20 Beav. 469 ; notwithstanding the suit be in a foreign court. *Graham v. Maxwell*, 1 Mac. & G. 71. He may set off such costs against his costs incurred before notice of the decree. 20 Beav. 409.

(*z*) *Turner v. Connor*, 15 Sim. 630.

(*a*) *Rouse v. Jones*, 1 Phill. C. C. 464.

(*b*) *Clarke v. Ormonde, Jacob*, 122. So, too, if he pays a creditor. *Irby v. Irby*, 24 Beav. 525, 530.

(*c*) *Clarke v. Ormonde, supra*.

(*d*) *Gaunt v. Taylor*, 2 Hare, 413.

But with respect to restraining a creditor from proceeding, after a decree, upon a verdict or judgment recovered by him against an executor or administrator, the following distinction was taken by Lord Eldon in *Brook v. Skinner*. (*e*) That if the plaintiff at law has recovered judgment *de bonis testatoris*, the court will restrain the creditor from taking execution on such judgment; and that if he has recovered *de bonis propriis*, the court will not restrain the execution. * So, in *Clarke v. Ormonde*, (*f*) his lordship said, that if a creditor has obtained judgment by which the executor is personally liable, *de bonis propriis*, the court had nothing to do with it; but if a judgment *de bonis testatoris*, it certainly would be a case for an injunction. And, in *Terrewest v. Featherby*, (*g*) where the executor pleaded, to an action on a bond, *non est factum* and *plene administravit*, upon both which pleas issue was joined, and a verdict entered for the plaintiff, his lordship refused an injunction, on a decree to account being obtained, observing, that the court had never so interfered upon a judgment *de bonis propriis*. And, in *Drewry v. Thacker*, (*h*) his lordship expressed strong doubts whether if judgment is recovered against an executor, under such circumstances that he cannot be permitted at law to dispute assets, he can obtain an injunction in a court of equity on an affidavit denying assets. And his lordship intimated his opinion, that there was no instance in the history of the court of chancery, where, after a judgment at law *de bonis testatoris et si non, de bonis propriis* of an executor, and execution issued, the proceedings at law had been restrained, on a decree subsequently obtained for administration of the assets. But, in *Lord v. Wormleighton*, (*i*) the executor pleaded, to an action by a creditor, *non-assumpsit*, a set-off, and *plene administravit*, and the verdict was against him on all these pleas. And, on a decree for the administration of the estate having been pronounced pending the action, Lord Eldon granted an injunction against the creditor, with a direction that the executor shall pay the costs at law, including the costs of the trial. And his lordship observed, that the case had been argued as if it was the case of a judgment *de bonis testatoris, et si non, de bonis propriis*; but that, in fact, it was a judgment for the damages *de bonis testatoris*, and for the costs only *de bonis*

(*e*) 5 Meriv. 481, note.(*f*) Jacob, 124.(*g*) 2 Meriv. 480.(*h*) 3 Swanst. 542, 543, 547, 548.(*i*) Jacob, 148.

propriis ; and as to the plea of *non-assumpsit*, * it was not a false plea ; for that if the executor merely puts in issue the fact of the debt, that is not false ; and his lordship added, that he was not sure that he had not a wrong notion of this at the time of deciding *Terrewest v. Featherby*. (*k*) So in *Fielden v. Fielden*, (*l*) after a decree for the administration of assets, the executor pleaded, to an action by a bond creditor, *non est factum* and *plene administravit* ; after which, an application was made for an injunction to restrain the creditor from proceeding in the action. It was contended, on behalf of the creditor, that as the executor, instead of giving notice of the decree, had pleaded pleas which, upon being falsified, would entitle the plaintiff to judgment *de bonis testatoris, et si non, de bonis propriis*, the court would not restrain the creditor from proceeding at law ; and *Terrewest v. Featherby*, and *Brook v. Skinner*, were cited ; to which it was answered that the case of *Harrison v. Beccles*, before Lord Mansfield, (*m*) had decided that an executor who pleaded *plene administravit* was only liable to the extent of assets come to his hands : and Sir John Leach V. C. granted the injunction, observing, that he considered the law to be now settled according to the doctrine laid down by Lord Mansfield in *Harrison v. Beccles*. And his honor further observed, that since, in the present case, it appeared, from affidavits, that the executor had pleaded to the action merely for the purpose of getting time to apply to a court of equity, that court would have protected the executor, on that ground alone, according to the decision of Lord Eldon in *Dyer v. Kearsley*, (*n*) where the executor submitted to a judgment by default, merely with a view to apply to a court of equity. (*o*)

With great deference, it is submitted, that some of the above distinctions and observations appear to have been made without a perfectly clear apprehension of the nature * and consequences of judgments at law against executors and administrators. In the first place, it must be observed, that there are but two cases in which the judgment against an executor is *de bonis testatoris, et si non, de bonis propriis* ; viz, where he pleads a release to himself, or *ne unques executor*. (*p*) In all other cases, without respect to

(*k*) *Ubi supra*.

(*l*) 1 Sim. & Stu. 255.

(*m*) Cited 3 T. R. 688.

(*n*) 4 Meriv. 482.

(*o*) See, also, *Vernon v. Thellusson*, 1 Phill. C. C. 466, 470, 471, accord.

(*p*) 1 Saund. 335, 336 *b*, note to *Hancock v. Prowd*. See *infra*, 1975.

the plea being false or even false within the knowledge of the executor, the judgment for the debt or damages is *de bonis testatoris* merely, and, *for the costs only, de bonis testatoris, et si non, de bonis propriis*. (q) Hence it appears, that, upon a plea of *plene administravit*, the judgment can in no case be entered *de bonis testatoris, et si non, de bonis propriis*; and the case of *Harrison v. Beccles* does not go to authorize a judgment of that nature to the extent of the assets found by verdict to be in the hands of the executor, but decides merely that the judgment shall be entered *de bonis testatoris* for that sum only, and not for the whole debt or damages proved. But, secondly, every judgment at law recovered against an executor (except a judgment of assets *in futuro*), whether by default or upon demurrer, or upon verdict, whatever may be the nature of the plea, is conclusive on the executor that he has assets to satisfy it; (r) and, consequently, whether the judgment be *de bonis testatoris, et si non, de bonis propriis* or *de bonis testatoris* merely, the executor is equally compellable to pay the debt and costs, ultimately out of his own pocket, if the assets are deficient. (s) The course of *compelling the payment is, indeed, different; for, on the former judgment, the creditor may have execution *de bonis propriis* forthwith, if no goods can be found by the sheriff which were the testator's; whereas, on the latter judgment, the creditor, unless the sheriff returns a *devastavit* to the *fieri facias*, must proceed by *scire fieri* inquiry, or by action of debt, suggesting a *devastavit*. (t)

Hence, it should seem to follow, that if the principle were, that a court of equity will not, by injunction, exclude creditors, proceeding at law, from the benefit of that due diligence by which they have established a right to be satisfied, either out of the assets of the deceased, or *de bonis propriis* of the representative, (u) that principle would apply to every case where the creditor has obtained a judgment at law of any kind other than a judgment of assets

(q) *Ib.* In some instances, indeed, the judgment is against the executor *de bonis propriis* in the first instance, and not *de bonis testatoris* at all; as where the executor is sued as assignee for rent accrued since the death of the testator, on a lease made to him; *ante*, 1758; or on his own promise in writing, upon good consideration, to pay the debt of the testator; *ante*, 1774; or, in debt on a judgment suggest-

ing a *devastavit*. See *infra*, 1987. But in these cases he is sued in his individual capacity, in the *debet* and *detinet*, and he cannot plead *plene administravit*.

(r) 1 Saund. 219 b, note to *Wheatley v. Lane*. See *infra*, 1985.

(s) 1 Saund. 337, note (1).

(t) See *infra*, 1984 *et seq.*

(u) See 3 Swanst. 547.

quando acciderint (except cases such as *Dyer v. Kearsley* and *Fielden v. Fielden*, where the executor has taken steps merely with a view to gain time to apply to the court of equity); because by judgment, in every case, the creditor has established a right to proceed against the goods of the representative, in the event of a deficiency of the goods of the deceased.

These observations appear in some degree justified by the late decision of *Lee v. Park*, (x) in which Lord Langdale M. R. refused a motion to restrain a creditor, after a decree in an administration suit, from issuing execution on a judgment obtained before the decree *de bonis testatoris, et si non*, as to the costs, *de bonis propriis*. For although his lordship grounded his refusal on the particular circumstances of the case, yet the learned judge, in giving his judgment, stated that he did not accede to the argument, that in cases of this nature the court pays no regard to the question whether the decree or judgment has priority in time, but considers only the quality of the judgment, so that the judgment being to recover *de bonis testatoris*, the executors are, of course, * entitled to restrain the judgment creditors from issuing execution. And his lordship further laid down, that it is not the ordinary rule that if a creditor has got a judgment before a decree, he must not take out execution; though there may be cases where, in reference to the conduct of the parties, and perhaps to the nature of the claim, he ought to be restrained therefrom.

In *Kent v. Pickering*, (y) which was a creditor's suit, one of the testator's creditors, who was not a party to the suit, had recovered judgment *de bonis testatoris, et si non, de bonis propriis*, (z) in an action brought by him against the defendants, the executors. A motion was made, after decree, for an injunction to restrain him from taking out execution on the judgment. Sir L. Shadwell V. C. said, that where there is a decree for the administration of the assets of a testator, the court will interfere, so far as may be necessary, to give effect to its own decree; but that it will not interpose to protect the executors from any liability to which they may have subjected themselves personally. And his honor granted an injunction to restrain the creditor from proceeding at

(x) 1 Keen, 714.

(y) 5 Sim. 55.

(z) *Sic* in the report; but *quære* whether

it was not a judgment *de bonis testatoris et si non*, for the costs only *de bonis propriis*.

law, against the assets of the testator only. And in *Burles v. Popplewell*, (a) a similar injunction was granted by the same learned judge, his honor observing, that he apprehended the rule of the court to be, that if the executor does, at law, so manage the matter as to make himself personally liable, the court of equity will leave him to be dealt with at law as the court of law will permit, but will not suffer any judgment that may be recovered at law to interfere with its own decree. It may be doubted, however, whether there is, in effect, any difference between such a special injunction and the general one, inasmuch as the creditor, in proceeding at law upon a judgment against the executor, must have resorted, and have resorted in vain, *to the assets, before he can have recourse to the property or the person of the executor.

It must, however, be observed, that if, on a judgment *de bonis testatoris* the plaintiff, not being able to find goods of the testator's whereupon to levy in execution, were to resort to the personal liability of the executor by means of a *scire fieri* inquiry or by action of debt suggesting a *devastavit*, and by this course were to compel the executor to satisfy the judgment out of his own property, the executor would become entitled to the assets for which he had thus paid an equivalent. For where a claim is made against an executor, if it is shown that he has goods in his hands which were the testator's, he may prove that he has paid to that value with his own money, and this will be a sufficient discharge. (b)

This principle was stated and acted on by Lord Lyndhurst in *Vernon v. Thellusson*. (c) In that case an application was made by the executor to stay further proceedings at law, on a *scire facias* issued on a judgment which had been obtained against the testator, on paying to the plaintiff at law his costs up to the time he had notice of the decree. It was objected that the executor had pleaded *plene administravit*, and consequently that the plaintiff had a right to proceed to trial to falsify that plea; and that the injunction, if granted at all, ought to be confined, according to *Kent v. Pickering*, to restraining execution against the assets of the testator. But Lord Lyndhurst C. was of opinion that further proceedings at law ought to be restrained. And his lordship, after

(a) 10 Sim. 383.

see *Hearne v. Wells*, 1 Coll. 323, 333,

(b) 1 Phill. C. C. 470; *ante*, 647. But per Knight Bruce V. C.

(c) 1 Phill. C. C. 466.

stating the doctrine above mentioned, as to the right of the executor to the assets, in the event of the judgment being satisfied out of his own property, observed, that if the action were allowed to proceed to judgment and execution, the result would be that the assets would thus * be withdrawn from the general fund which ought to be distributed by the court of equity for the common benefit of all the creditors. For that this consequence would follow whether the assets were discovered and taken in execution by the sheriff on the judgment, or upon the return of *nulla bona*, were ultimately, upon a *scire fieri*, to be satisfied out of the goods of the executors. And his lordship added, that he concurred, therefore, in the decision of Lord *v. Wormleighton*. (*d*)

In *Kirby v. Barton*, (*e*) a judgment creditor of the testator issued a *scire facias* out of the court of exchequer, on the 2d of February, 1843, and on the 27th of April, the executor let judgment go by default. On the 3d of April, 1844, a decree was obtained. On the 25th of May, the executor procured the court of exchequer to set aside the judgment, on the terms that he should plead *plene administravit*, and that judgment, if obtained, should be entered *nunc pro tunc*. On the eve of the trial, the executor applied to Lord Langdale M. R. for an injunction to stay proceedings at law. His lordship was of opinion that he ought to stay execution on the judgment, but doubted whether, after so much delay, he ought to stay the trial. However, on the executor consenting to give judgment, his lordship ordered execution to be stayed and that the judgment should be dealt with as the court might direct; and ultimately refused to allow any further proceedings at law to be taken on the judgment. In the course of his observations, his lordship remarked, "The plaintiffs at law say, 'Why are we not to get the benefit of our judgment? we do not intend to go against the assets, but against the executor personally, after * nominally proceeding against the assets.' I do not think that would be right."

Again, with respect to restraining proceedings at law against the

(*d*) *Ante*, 1919. His lordship, in the course of his observations, remarks that the judgment on the plea of *plene administravit*, if the verdict were found for the plaintiff, would be *de bonis testatoris* only, and not *de bonis testatoris et si non, de bonis propriis*; and appears in some measure, perhaps, to concede that if the judgment were in the latter form, the principle on which he granted the injunction would be inapplicable. *Sed quære de hoc*.
(*e*) 8 Beav. 45.

heir. In *Price v. Evans*, (*f*) the heir of an intestate, in an action by a bond creditor against him, had pleaded a false plea, and Shadwell V. C., after a decree obtained in a suit by another creditor, for the administration of the assets, restrained the plaintiff at law from taking execution against the assets, but not from proceeding against the heir personally. But in *Rouse v. Jones*, (*g*) which was a creditor's suit against the real and personal representatives of an intestate for payment of his debts, the defendant, the heir, after the usual decree had been obtained, moved before Shadwell V. C. for an injunction to restrain further proceedings in an action which had been brought against him by a bond creditor of the intestate. The application was resisted on the ground that, before the decree was made, issue had been joined in the action on a plea of *riens per descent præter*, &c. and that if such plea should be falsified the plaintiff would be entitled to judgment against the heir *de bonis propriis*, and thus have a personal remedy against him. The vice chancellor having refused the motion with costs, it was renewed, by way of appeal, before Lord Lyndhurst C., who held that the injunction ought to be granted. His lordship observed, that if, on the trial of the issue, the jury should find that the heir had assets by descent, other than those mentioned in his plea, it would be their duty to assess the value of such lands, and for their value thus found (*h*) the plaintiff would be entitled to judgment and execution against the heir as for his own debt. But upon the amount being levied or paid, the lands, in respect of which the levy or payment was made, would become the property of the heir. And thus these assets * would be withdrawn from the fund which ought to be applied for the general benefit of the creditors under the decree; and this, too, in a case where the decree was prior in date to the judgment.

The latest on this subject is *Vincent v. Godson*. (*i*) There, a bond creditor of the testator, after a bill had been filed in an administration suit by another creditor, but *before any decree* thereon, had obtained judgment for his debt against the executor *de bonis testatoris*. Whereupon an injunction was applied for to stay execution. But Knight Bruce V. C. after an argument, in

(*f*) 4 Sim. 514.

(*g*) 1 Phill. C. C. 462.

(*h*) *Semble*, the plaintiff would, in such case, be entitled to a general judgment for

the debt, damages, and costs. See 2 Saund. 7 c, note (4).

(*i*) 3 De G. & Sm. 717.

the course of which all the previous authorities were cited, said he did not see any sufficient ground, in point of precedent or in reason and justice, for depriving the creditor of the benefit of the judgment, and refused the injunction, on the ground, it should seem, that the difficulties in the way of the interfering in the executor's favor were, with regard to his personal liability, insurmountable. (*k*)

In *Oldfield v. Cobbett*, (*l*) a creditor of the testator filed a bill against the executor for administration, and obtained an injunction and receiver. The plaintiff was found a creditor; and the cause was heard on further directions; but the injunction and receiver were not continued. The executor afterwards brought an action at law against the plaintiff for moneys due to the testator. But the court, by injunction, summarily restrained the proceedings. And on a subsequent occasion, (*m*) Lord Langdale determined, that after the estate of the testator has been fully administered in a court of equity, the defendant, the executor, cannot be permitted, without the leave of the court, to commence an action to *recover from the plaintiff in the suit a portion of the testator's property.

Injunction to restrain the executor from proceeding at law against the plaintiff in the creditor's suit.

Upon the principle mentioned above, (*n*) the court of chancery will, after a decree made in an ordinary administration suit, restrain proceedings in a foreign country for the administration of the personal estate; and, it would seem, of the real estate as well, unless it can be shown that the party instituting such a suit can carry on proceedings as to the landed estate without proceeding as to the personal estate. (*o*)

Injunction in an administration suit to restrain proceedings in a foreign country.

It may be observed, in conclusion, that an executor or administrator will not be allowed to sue or defend as a pauper, "because the indulgence intended poor persons not of ability to sue for their rights *in formâ pauperis* only.

Executor cannot sue or defend *in formâ pauperis*.

(*k*) The learned judge observed that it was unnecessary to consider how the matter would have stood, if the decree had been earlier than the judgment. But that the judgment, having preceded the decree, might (independently of any personal liability at law brought by the judgment upon the defendant at law) have

the effect of placing the plaintiff at law above all the other creditors in the court of equity.

(*l*) 5 Beav. 132.

(*m*) 6 Beav. 515.

(*n*) *Ante*, 1913, 1914.

(*o*) *Hope v. Carnegie*, L. R. 1 Ch. App. 320.

extends to persons suing in their own rights, and not as executor or administrator." (*p*)

(*p*) *Paradise v. Sheppard*, 1 Dick. 136; Sim. 182. See *Bayly v. Bayly*, 11 Beav. Beames on Costs, 78; *Oldfield v. Cobbett*, 256; [*McCoy v. Broderick*, 3 Sneed 1 Phill. C. C. 613; *Fowler v. Davies*, 16 (Tenn.), 203.]

* BOOK THE SECOND.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS.

IN the last place, it is proposed to treat of the remedies against executors and administrators, by means of which their various duties and liabilities may be enforced in the courts of law and of equity.

Before entering on this subject, it may be remarked, that no suit can be brought against any executor or administrator, in his official capacity, in the court of any country ^{Foreign} ~~executors.~~ but that from which he derives his authority to act by virtue of the probate or letters of administration there granted to him. (a) Therefore, if a foreign creditor wishes a suit to be brought here, in order to reach the effects of a deceased testator or intestate situate in England, it will be necessary, before the suit can be maintained, notwithstanding an executor or administrator has been appointed abroad, that an English personal representative should also be duly constituted by grant from the proper ecclesiastical court here; for the foreign executor or administrator is not liable to be sued, in his official character, in this country. (b)

(a) Story's Conf. § 513; [Beeler v. Dunn, 3 Head, 87; Brookshire v. Dubose, 2 Jones Eq. 276; *ante*, 362, note (u), 430.]

(b) Tyler v. Bell, 1 Keen, 826, 829; S. C. 2 My. & Cr. 89, 100; Story's Conf. §§ 513, 514; Flood v. Patterson, 29 Beav. 295. [It was decided in Taylor v. Barron, 35 N. H. 484, that there is no legal privity between administrators appointed in different states. Bell J. said: "In this country it is settled by many decisions that our courts take no notice of a foreign

administration, as conferring the right to sue or defend as executor or administrator; and before either can be recognized as the personal representative of the deceased, he must be clothed with authority from the laws of the state in whose courts he desires to appear. Administration only extends to the assets of the intestate within the state where it was granted. Doolittle v. Lewis, 7 John. Ch. 47; Morrell v. Dickey, 1 John. Ch. 153; Smith v. Webb, 1 Barb. 230; Hobart v. Conn. Turnp.

But it must be observed, that if he should collect the effects or debts of the deceased found or due in England, without taking

Co. 15 Conn. 145; *Picquet v. Swan*, 3 Mason, 469; *Brookshire v. Dubose*, 2 Jones Eq. 276; *Kirkpatrick v. Taylor*, 10 Rich. (Law) 393; *Young v. O'Neil*, 3 Sneed (Tenn.), 55; *Slauter v. Chenowith*, 7 Ired. 211. As an administrator appointed in one state cannot sue in the courts of another state, so he cannot be sued in another state in that capacity. *Norton v. Palmer*, 7 Cush. 523, 524; *Goodall v. Marshall*, 11 N. H. 88; *Brown v. Brown*, 1 Barb. Ch. 189; "Clark v. Clement, 33 N. H. 567; *ante*, 362, note (u); *Judy v. Kelley*, 11 Ill. 211; *Vaughan v. Northrop*, 15 Peters, 1; *Brookshire v. Dubose*, 2 Jones Eq. 276. An administrator appointed in another state is accountable only according to the laws of that state. *Fay v. Haven*, 3 Met. 109; *Vermilya v. Beatty*, 6 Barb. 429; *Sparks v. White*, 7 Humph. 25. He cannot, therefore, be sued elsewhere, even on a judgment against him rendered in the state where he was appointed; *Pond v. Makepeace*, 2 Met. 114; *Goodwin v. Jones*, 3 Mass. 514; *Cutter v. Davenport*, 1 Pick. 86; where he is charged in his representative character, and not *de bonis propriis*. In *Tal- mage v. Chapel*, 16 Mass. 71, 73, it was held that an administrator appointed in Massachusetts cannot maintain an action upon a judgment recovered by an administrator appointed in New York, for want of privity. *Slauter v. Chenowith*, 7 Ired. 211; *Rosenthal v. Renick*, 44 Ill. 202. A decree, made in the high court of chancery, in a suit wherein an administrator appointed there is plaintiff, and an executor qualified there is defendant, does not estop an administrator appointed in Pennsylvania from suing the same executor qualified in Pennsylvania, upon the same title asserted in the English bill, the subject-matter of the first suit being assets in England, and of the second suit, assets in Pennsylvania; the representatives in England and in Pennsylvania were distinct, and the property in the

controversy in the two countries is distinct. *Aspsden v. Nixon*, 4 How. (U. S.) 467, 497. It was held in *Stacy v. Thrasher*, 6 How. (U. S.) 44, that an action will not lie against an administrator in one state, on a judgment recovered against a different administrator of the same intestate, appointed under the authority of another state. There is no privity between the two. "Each is privy to the intestate, and would be estopped by a judgment against him; but they have no privity with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, incumbered by the same debts, as in the case of an administrator *de bonis non*, who may be truly said to have an official privity with his predecessor in the same trust, and, therefore, liable to the same duties." Grier J. in *Stacy v. Thrasher*, 6 How. (U. S.) 44, 59; *Low v. Bartlett*, 8 Met. 259; *Ela v. Edwards*, 13 Allen, 48; *Taylor v. Barron*, 35 N. H. 484, 501; *McLean v. Meek*, 18 How. (U. S.) 16; *Brodie v. Bickley*, 2 Rawle, 431; *Merrill v. New England Mut. Life Ins. Co.* 103 Mass. 245, 249; *Leonard v. Putnam*, 51 N. H. 247, 249, 250; *Clark v. Clement*, 33 N. H. 563; *Dent v. Askley*, Hempst. 54; *King v. Clarke*, 2 Hill (S. Car.) Ch. 611; *Goodall v. Marshall*, 14 N. H. 161, 169; *Aspsden v. Nixon*, 4 How. (U. S.) 467; *Hill v. Tucker*, 13 How. (U. S.) 466, 467; *Dent v. Ashley*, 1 Hemp. 54; *Beaman v. Elliott*, 10 Cush. 172; *Norwood v. Cobb*, 20 Texas, 588. But the law is otherwise in the case of co-executors holding their offices under different appointments in different states. This was decided in *Hill v. Tucker*, 13 How. (U. S.) 458, and *Goodall v. Tucker*, 13 How. (U. S.) 469, where it was held

out letters of administration here, he would thereby become liable as executor *de son tort*, to the extent of the assets so received by him. (c)

that the relation between executor and testator is altogether different from that between an administrator and the intestate. The executor's interest in the testator's estate is what the testator gives him ; that of an administrator is only that which the law of his appointment enjoins. Though there are several executors of the same will in different jurisdictions, they are, as to creditors of the testator, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor. The privity arises from their obligations to pay the testator's debts. All of them, then, having the same privity with each other and to the testator, and the same responsibility to creditors, though they may have been qualified as executors in different sovereignties, an action for a debt due by the testator, against any one of them in that sovereignty where he undertook to act as executor, places all of them in one relation concerning it, and as to the remedies for its recovery ; what one may plead to bar a recovery another

may plead ; and that which will not bar a recovery against any of them, applies to all of them. But the court say : " We do not think that a judgment obtained against one of several executors would be conclusive as to the demand against another executor, qualified in a different state from that in which the judgment was rendered. But such a judgment may be admissible in evidence in a suit against an executor in another jurisdiction, for the purpose of showing that the demand had been carried into judgment in another jurisdiction, against one of the testator's executors, and that the others were precluded by it from pleading prescription or the statute of limitations upon the original cause of action." See *Jackson v. Tiernan*, 15 Louis. 485.]

(c) See *ante*, 258, 259. But in a suit in equity the presence of an executor *de son tort* in court will not dispense with that of a regular representative. 2 Phill. C. C. 152 ; *post*, ch. II.

* CHAPTER THE FIRST.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS AT LAW.

AN action of *debt* did not formerly lie against an administrator upon a simple contract, when the testator or intestate could have waged his law; (a) not because such action dies with the person, but because the executor or administrator, as he is presumed to be ignorant of the contract made by the testator or intestate, could not wage his law. (b) Accordingly, debt did not lie against an executor or administrator upon an award made in the lifetime of his testator, because he might, if living, have waged his law to this action. (c) But where the testator or intestate himself could not have waged his law, debt lay against his executor or administrator; as debt for rent upon a parol lease made to the deceased, or by a jailer for diet provided for him while in prison. (d) For the same reason, debt on simple contract lay against an executor or administrator in the exchequer, because, in that court, no wager of law was allowed. (e) Again, debt lay, at common law, against an *executor or administrator upon a simple contract made with himself after the death of the testator or intestate; for the principle, that the defendant could not wage his

No action lay at common law against an executor in which the testator could have waged his law.

(a) *Barry v. Robinson*, 1 New Rep. 293.

(b) *Pinchon's case*, 9 Co. 87 b; *Bowyer v. Garland*, Cro. Eliz. 600; *Hambly v. Trott*, Cowp. 375.

(c) *Hampton v. Boyer*, Cro. Eliz. 567; *Bowyer v. Garland*, 2 Roll. Abr. 107 C. pl. 3; 2 Saund. 73, note (2), to *Roberts v. Mariett*.

(d) 9 Co. 87 b; [*Thompson v. French*, 10 Yerger, 452.]

(e) 9 Co. 87 b. So a *concessit solvere*, which lies by custom in the courts of the

cities of London and Bristol, the county of the borough of Carmarthen, and other places, being an action of debt upon simple contract, could not be brought against an executor or administrator, because he could not wage his law; but by the custom of London the defendant could never wage his law on this action, and, therefore, a *concessit solvere* always lay there against an executor or administrator. *Snelling's case*, 5 Co. 82 b; S. C. Cro. Eliz. 409; 1 Saund. 68, note (2).

law, does not apply in such a case, where the undertaking to pay originates with the personal representative, who is, therefore, well acquainted with the transaction. (*f*) And it has always been held that *assumpsit* lay against an executor or administrator, upon the simple contract of his testator or intestate; because, in that action, no wager of law was allowed. (*g*)

And now by stat. 3 & 4 W. 4, c. 42, s. 13, it is enacted that "no wager of law shall be hereafter allowed." And by s. 14, "an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator." (*g*¹)

(*f*) Riddell v. Sutton, 5 Bing. 206.

(*g*) *Ante*, 790, note (*s*); 1 Saund. 217, note; notwithstanding what is said to the contrary, in Slade v. Morley, Yelv. 20; Plowd. 182; 9 Co. 87 b.

(*g*¹) [See *post*, 1937, note (*i*). In Vermont, all estates are settled, as in many of the states insolvent estates are settled upon a representation of insolvency. By the Genl. Sts. Vt. c. 53, § 1, the probate court is required to appoint commissioners to report the debts due from the estate, in all cases, except where it shall appear that there are no debts due from the estate, or where, being less than \$300 in all, it shall be assigned to the widow. In *University of Vermont & Agricultural College v. Baxter*, 43 Vt. 645, 650, Wheeler J. said: "In this state no action, according to the course of the common law, is allowed against executors or administrators except ejectment, to recover some real estate, or replevin to recover some specific personal property. Genl. Sts. Vt. 401, § 15; *Boyden v. Ward*, 38 Vt. 628. No other action can be prosecuted otherwise than by being presented to commissioners. The commissioners are appointed to receive, examine, and adjust claims against the deceased. Genl. Sts. Vt. 400, § 1. They have jurisdiction of all actions that survive by the common law, and several others in addition. Genl. Sts. Vt. 391, §§ 10, 11, 12. But their jurisdiction extends only to the determination of the validity of the claims. They have nothing whatever to do with the assets. The commissioners

are not authorized to render any judgment to be satisfied out of any particular property. The distribution of the assets of the estate in satisfaction of the judgments appertains to the probate court acting independently of the commissioners. *Perrin v. Sargent*, 33 Vt. 84." The judgments of the commissioners "are generally all as of one date; and always so except for the purpose of supplying some accidental or irregular omission. The judgments are perfected by the action of the probate court upon them, and all of them become final when any of them do, so far as the action of the commissioners is concerned, if all the proceedings are regular and in order. There are no means of making the assets known to the commissioners, and neither the existence or want of assets is made in any way the foundation of any judgment by them. The questions that they pass upon pertain wholly to the liability of the deceased, and not at all to his ability to meet his liabilities. Their judgments are like that part of the judgments at common law, in actions against executors and administrators, which pertains to the cause of action, aside from that part which pertains to the satisfaction of the judgments. On appeal from the decision of the commissioners the appellate court should decide the same as the commissioners ought to decide. The judgments when recorded are certified back to the probate court, where the judgments of the commissioners are, and they stand there, with the judgments of the com-

No action of account lay against an executor or administrator at common law ; because the account rested in the privity and knowledge of the deceased only. (*h*) But this action is given by stat. 4 & 5 Ann. c. 16, s. 27.

It was holden, in *Atkins v. Hill*, (*i*) and *Hawkes v. Saunders*, (*k*) that an action might be maintained in a court of common law against an executor, upon his promise to pay a general legacy, in consideration of assets. (*k*¹) But

missioners in all things as if made by them."]

(*h*) Co. Litt. 89 *b* ; 2 Inst. 404.

(*i*) Cowp. 284.

(*k*) Cowp. 289.

(*k*¹) [In many of the American States assumpsit or contract will lie after demand for a pecuniary legacy, which has become due, without any express promise. Genl. Sts. Mass. c. 97, § 22 ; *Blackler v. Boott*, 114 Mass. 24 ; *Farwell v. Jacobs*, 4 Mass. 635 ; *Cowdin v. Perry*, 11 Pick. 503 ; *Jones v. Richardson*, 5 Met. 249 ; *Colwell v. Alger*, 5 Gray, 67 ; *Pollard v. Pollard*, 1 Allen, 490 ; *Brooks v. Lynde*, 7 Allen, 64, 66 ; *Kent v. Dunham*, 106 Mass. 586 ; *Miles v. Boyden*, 3 Pick. 213 ; *Tappan v. Tappan*, 30 N. H. 505 ; *Warren v. Rogers*, 2 Root, 166 ; *Knapp v. Hanford*, 6 Conn. 176 ; *Goodwin v. Chaffee*, 4 Conn. 163 ; *Colt v. Colt*, 32 Conn. 422, 451 ; 1 Swift Dig. 455 ; *Smith v. Lambert*, 30 Maine, 137 ; *Prescott v. Morse*, 62 Maine, 447 ; *Payne v. Smith*, 12 N. H. 74 ; *Cowell v. Oxford*, 6 N. J. (Law) 432 ; *Woodruff v. Woodruff*, 3 N. J. (Law) 552 ; *Clark v. Herring*, 5 Binn. 33 ; *Wilson v. Wilson*, 3 Binn. 559 ; *Solliday v. Bissey*, 12 Penn. St. 341 ; *Prescott v. Barker*, 14 Mass. 428. In New York, see *Kelsey v. Deyo*, 3 Cowen, 133 ; *Tole v. Hardy*, 6 Cowen, 333 ; *De Witt v. Schoonmaker*, 2 John. 243. In North Carolina, see *M'Neil v. Quince*, 2 Hayw. 153. A bill in equity will lie in such a case where there is ground, in the circumstances connected with the claim, to sustain the equitable jurisdiction. *Colt v. Colt*, 32 Conn. 422. Under the statute of Massachusetts, an action of contract will lie for a specific legacy. *Colwell v. Alger*, 5 Gray, 67 ;

Blackler v. Boott, 114 Mass. 24, 26 ; Genl. Sts. Mass. c. 97, § 22. In *Blackler v. Boott*, 114 Mass. 24, it was held that in an action against an executor for a legacy a debt due from the plaintiff to the testator may be set off against the legacy. As the ground of this decision the court say a legacy may be recovered against an executor. "The law implies the contract, and thus it is brought within the provisions of the statute of set-off." *Wells J.* 114 Mass. 26. As to the limit of time before which an action cannot be sustained against an executor for a legacy, see *ante*, 1387, and cases cited in note (*q*). One who takes land devised to him under a charge or on condition of his paying a legacy on an annuity, is liable in assumpsit or contract for the legacy or annuity, without any express promise to pay. *Felch v. Taylor*, 13 Pick. 133 ; *Swasey v. Little*, 7 Pick. 296 ; *Sheldon v. Purple*, 15 Pick. 528 ; *Adams v. Adams*, 14 Allen, 65 ; *Hoover v. Hoover*, 5 Penn. St. 351 ; *Doolittle v. Hilton*, 63 Maine, 537 ; *Willis v. Roberts*, 48 Maine, 257 ; *Lobach's case*, 6 Watts, 167 ; *Larkin v. Mann*, 53 Barb. 267 ; *Perry v. Hale*, 44 N. H. 363, 365 ; *Pickering v. Pickering*, 6 N. H. 120 ; *Pickering v. Pickering*, 15 N. H. 290 ; *Kelsey v. Western*, 2 Comst. 501 ; *Veazey v. Whitehouse*, 10 N. H. 409. See *Beecker v. Beecker*, 7 John. 99 ; *Kelsey v. Deyo*, 3 Cowen, 133 ; *Glen v. Fisher*, 6 John. Ch. 33 ; *Tole v. Hardy*, 6 Cowen, 333 ; *Gridley v. Gridley*, 24 N. Y. 130 ; *Van Orden v. Van Orden*, 10 John. 30 ; *Mahar v. O'Hara*, 9 Ill. 424 ; *Brown v. Furer*, 4 Serg. & R. 213 ; *Gause v. Wiley*, 4 Serg. & R. 504 ; *Mittenberger v. Schlegel*, 7 Penn. St. 241 ; *ante*, 1272, note (*n*).

these cases are considered as overruled by the decision of *Deeks v. Strutt*. (1) There an action of *assumpsit* for a general legacy: was brought against the executor for the arrears of an annuity bequeathed to the wife of the plaintiff. The executor never made any express promise to pay; but the assets were sufficient to satisfy the plaintiff's demand. It was contended for the plaintiff, that where a man is under a legal or equitable obligation to pay, the law implies a promise, though none * were ever made. And for this the case of *Hawkes v. Saunders* was cited. But the court of K. B. decided that the action could not be maintained. And Lord Kenyon, in giving his judgment, made the following observations: "The supporting of the present action would be attended with the most pernicious consequences; and I believe that no action till lately (except one, in the time of the Commonwealth), for a legacy, has been supported in a court of law. The arguments, which have of late years been advanced in support of this action, are founded on the supposed justice of the case, and the convenience of the parties. But when it is considered in what manner a court of equity interposes in suits for legacies, in taking care that provision is made for the different parties entitled, and what inconvenience and even ruin to private families would have

So where a testator devised all his real estate to his sons by their paying to each of his daughters a certain sum "out of the estate," it was held that the sons took an absolute estate in fee, charged with legacies to the daughters, and not an estate upon condition; and that the daughters had a remedy for non-payment of their legacies, by action at law, not only against the sons, but also against any tertenants who purchased the estate with notice of the charge. *Taft v. Morse*, 4 Met. 523, 528; *Swazey v. Little*, 7 Pick. 296. Or by a bill in equity, which is probably the more appropriate remedy. *Taft v. Morse*, 4 Met. 523, 528; *Eland v. Eland*, 1 Beav. 235; S. C. 4 My. & Cr. 420. This subject was very fully examined by Parker C. J. in *Pickering v. Pickering*, 15 N. H. 281, from which it appears that the remedy in equity in such cases is more appropriate and complete. The learned judge examines the case of *Swazey v. Little*, *supra*, and accounts for the decision

on the ground of an insufficient equity jurisdiction in Massachusetts at the time it was made. See *Harris v. Fly*, 7 Paige, 427; *Glen v. Fisher*, 6 John. Ch. 33, 36. The remedy at law would be quite inadequate under circumstances pointed out or appearing in *Pickering v. Pickering*, *supra*, and in *Perry v. Hale*, 44 N. H. 363. In an action against an executor to recover a legacy, the plaintiff must allege that the defendant, at the time of action brought, had assets sufficient to pay debts and legacies. *De Witt v. Schoonmaker*, 2 John. 243. It was held in *Kayser v. Disher*, 9 Leigh, 357, that an action at law by a legatee against an executor for a legacy, on the executor's promise to pay it, must be brought against the executor in his individual, not in his representative, character, and the judgment in such case must be *de bonis propriis*. So held in *Pettigrew v. Pettigrew*, 1 Stewart (Ala.), 580.]

(1) 5 T. R. 690.

ensued from determining that an action can be brought in a court of law for a legacy, I think that those who have wished to support the action in a common law court, would hesitate before they came to the conclusion that the action can be maintained. If an action will lie for a legacy, no terms can be imposed on the party who is entitled to recover; and, therefore, when the legacy is given to a wife, the husband would recover at law, and no provision could be made for the wife or family; whereas, a court of equity will take care to make some provision for the wife in such case. But the whole of this admirable system, which has been founded in a court of equity, will fall to the ground, if a court of law can enforce the payment of a legacy. I mention these as decisive reasons in my mind against the jurisdiction of the courts of law over this subject; and I know that they have influenced those who once entertained an idea that this action could be supported."

It will be observed that, in *Deeks v. Strutt*, the executor had not expressly promised to pay; and this circumstance has led to doubts whether the decision of that case went farther than to determine that an action for a legacy cannot be supported upon an implied assent in law of the executor, * and whether an action will not still lie upon an express promise by him in consideration of assets, or upon an express admission by him that he has money in his hands for the payment of the legacy. (m) However, the judgment of Lord Kenyon has been generally considered as an unqualified decision that an action at law cannot be maintained for a legacy. (n) And in a modern case, (o) it was holden by the court of K. B. that an action at law for a distributive share of an

(m) See the judgment of Grose J. in *Deeks v. Strutt*, 5 T. R. 693, and of Lawrence J. in *Doe v. Guy*, 3 East, 124, and the case of *Gorton v. Dyson*, 1 Brod. & Bing. 219. See, also, *ante*, 1782, 1783.

(n) By Littledale J. 7 B. & C. 544. See, also, *Nicholson v. Sherman*, T. Raym. 23; S. C. Sid. 45; *Farish v. Wilson*, Peake N. P. C. 73; [*ante*, 1931, note (k¹). The action is given by statute, in Massachusetts. Genl. Sts. Mass. c. 97, § 22.]

(o) *Jones v. Tanner*, 7 B. & C. 542. [But it appears from many cases in the American States that an action at law

can be maintained against an administrator for a distributive share. *Commonwealth v. Hammond*, 10 B. Mon. 62; *Negley v. Gard*, 20 Ohio, 310; *Gould v. Hayea*, 19 Ala. 438; *Waldsmith v. Waldsmith*, 2 Ohio, 156. As to the pleadings and judgments in such cases, see *Waldsmith v. Waldsmith*, *supra*. The distributees or next of kin can, however, maintain no suit, either at law or in equity, for the mere purpose of distribution, until letters of administration have been granted on the estate of the deceased. *Gardner v. Gantt*, 19 Ala. 666.]

intestate's property cannot be maintained against the personal representative, although he may have expressly promised to pay. (*p*)

But the law is different with respect to *specific* legacies; for, after an assent by an executor to a specific legacy, he is clearly liable at law to an action by the legatee; because the interest in any specific thing bequeathed vests at law in the legatee, upon the assent of the executor. (*q*) Therefore, a devisee of chattel leaseholds may bring ejectment to recover them against the executor, after an assent by him to the bequest. (*r*) So an action of trover will lie for a specific legacy, after the executor has assented. (*s*)

It must also be observed, that executors may, by arrangement * with the legatees cease to hold the money bequeathed in their character of executors; in which case they are obviously liable to be sued at law. Thus, in *Gregory v. Harman*, (*t*) the plaintiff and three others being residuary legatees under the will of one T. P., the defendants, as the executors named in the will, accounted with them, and having paid to the latter the respective sums due to them thereon, took from them, and from the plaintiff, a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands. And it was held that the money, not being retained by the defendants in their character of executors the plaintiff was entitled to recover it in an action at law. Again, in *Hart v. Minors*, (*u*) E. by will bequeathed, subject to debts and legacies, the residue of his personal estate to his executors, upon trust to divide the same into two equal parts, and to divide one of such

secus as to a specific legacy after assent:

or where he has ceased to hold the money as executor:

(*p*) See accord. 1 Y. & Coll. C. C. 167, per K. Bruce V. C. in *Holland v. Clark*. [But see *App v. Dreisbach*, 2 Rawle, 287; *Solliday v. Bissey*, 12 Penn. St. 347; *Commonwealth v. Hammond*, 10 B. Mon. 62; *Negley v. Gard*, 20 Ohio, 310; *Gould v. Hayes*, 19 Ala. 438; *Gardner v. Gantt*, 19 Ala. 666.] See, also, *Johnson v. Johnson*, 3 Bos. & Pull. 169, where Lord Alvanley C. J. observed that, "if an executor, thinking that he has settled the affairs of his testator, pay the legacies, I have no difficulty in saying that a court of common law would not entertain an action

for money had and received against a legatee, since such a court cannot take into consideration, as a court of equity would do, the mode in which the funds might have been applied." See, as to an action for a legacy charged on land, *Braithwaite v. Skinner*, 5 M. & W. 313.

(*q*) *Ante*, 1378, 1379; [*Colwell v. Alger*, 5 Gray, 67; *Blackler v. Boott*, 114 Mass. 24, 26.]

(*r*) *Doe v. Guy*, 3 East, 120.

(*s*) *Williams v. Lee*, Atk. 223.

(*t*) 1 Moore & P. 209.

(*u*) 2 Cr. & M. 700.

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parts into six equal shares, and to pay one of such shares unto each of his cousins, E. T., J. W., and J. H., and the remaining share as therein mentioned, and appointed M. his executor, who duly approved the will. M., having taken upon himself the execution of the will, called a meeting of the residuary legatees, at which J. H. was present, and exhibited an account, charging himself with assets, and paid some of the legatees the greater portion of their share of the residue, and was about to pay J. H., but was prevented from so doing. Another meeting was afterwards called, at which J. H. was not present, when the executor exhibited another account, charging himself with assets, and crediting himself with payments and disbursements, and, amongst others, with having paid "cash for legacy duties." To this was appended a supplemental account, containing, amongst others, the following item: "By cash retained for J. H., 179*l.* 10*s.*" In an action for money had and received, and on an account stated, brought by J. H. against the executor to recover the amount of the legacy, it was held by the *barons of the exchequer that the action was maintainable, on the ground of a certain sum having been received and retained by the defendant for the plaintiff's use, by which the defendant ceased to hold the money in his character of executor. (x)

9 & 10
Vict. c. 95.
13 & 14
Vict. c. 61.
legacy,
&c. not ex-
ceeding
50*l.* recov-
erable in
county
court.

The jurisdiction of the county courts is, by stat. 9 & 10 Vict. c. 95, s. 65, and stat. 13 & 14 Vict. c. 61, extended to the recovery of a demand not exceeding 50*l.*, for a distributive share under an intestacy, or a legacy under a will.

Where money is bequeathed to an executor in trust, that is, where he has trusts to perform with respect to the bequest which do not form part of the ordinary duties of an executor, the case is not within the jurisdiction conferred on the county court by these acts. (y) But a bequest, though made in terms to an executor in trust, may be claimed in the county court

(x) See, also, *Gorton v. Dyson*, 1 Brod. & Bing. 219; *Moart v. Moessard*, 1 Moore & P. 8; *Rose v. Savory*, 2 Bing. N. S. 145; *Wasney v. Earnshaw*, 4 Tyrwh. 806; 459, by Rolfe B.; *Bond v. Nurse*, 10 Q. B. 244; *Edwards v. Lowndes*, 1 El. & Bl. 81; *Topham v. Morecroft*, 8 El. & Bl. 972.
Roper v. Holland, 3 Ad. & El. 99; S. C. 4 Nev. & M. 868; *Edwards v. Bates*, 7 M. & Gr. 590; *Bartlett v. Dimond*, 14 M. & W. 49, 56; *Pardoe v. Price*, 16 M. & W. 492.
(y) *Hewston v. Phillips*, 11 Ex. 699. See, further, as to what is a claim for a legacy, *Longbottom v. Longbottom*, 8 Ex. 203.

if the executor has really nothing more to do than he would be bound to do upon a simple bequest to a legatee, (z)

It has been shown, that in the case of an action brought *by* executors, they must all join, whether they have administered or not. (a) But the rule as to rejoinder is different in actions *against* executors or administrators. (a¹) Therefore, where the defendant pleads in abatement that he has one or more co-executors who ought to be joined, he must *aver, not only that the co-executor is alive, (b) but that he has *administered*; because it is only necessary to sue so many of the executors as have administered. (c)

In an action against a married woman executrix, the husband must be joined as a defendant. (d) And they must both plead; otherwise it will be a discontinuance. (e) If a *feme covert* and a stranger are executors, the action must be against the stranger, executor, and the husband and wife, executrix. (f)

If trover be brought against a defendant executor, and others not executors, and the jury either find them all guilty, or the executor not guilty and the others guilty, the judgment will be erroneous; because an action of trover does not survive against an executor for a conversion by his testator, (f¹) and the defendants are improperly joined, inasmuch as the judgment against them is different. But the plaintiff may cure this defect by entering a *nolle prosequi* against the executor, and taking his judgment against the others. (g)

(z) *Pears v. Wilson*, 6 Ex. 833. See, also, *In re Fuller*, 2 El. & Bl. 573. The county court may well try a question of *devastavit* in such a suit. *Winch v. Winch*, 13 C. B. 128. The grant of letters of administration is part of the cause of action. 2 El. & Bl. 573.

(a) *Ante*, 1867.

(a¹) [See *Owen v. Brown*, 2 Ala. 126; *Jones v. Wilkinson*, 3 Stewart, 44; *Barnes v. Jarnagin*, 12 Sm. & M. 108.]

(b) *Hilbert v. Lewis*, 1 Freem. 268.

(c) Bro. Exors. 20, 88; Wentw. Off. Ex. 205, 14th ed.; *Swallow v. Emberson*, 1 Lev. 161; Com. Dig. Abatement, F. 10; *Alexander v. Mawman*, Willes, 42; 1 Saund. 291 m, note. [See *Barnes v. Jarnagin*, 12 Sm. & M. 108.] As to the form of the plea, see *Ryalls v. Bramall*, 1 Ex.

734. [To authorize a joint judgment against two who are sued as executors, the proof must show a joint liability as such; if one only is proved to be liable, and he personally, the plaintiff must fail. *Moody v. Ewing*, 8 B. Mon. 521.]

(d) Com. Dig. Admon. D.

(e) *Aylworth v. Fenn*, 1 Freem. 351.

(f) Com. Dig. Abatement, F. 20.

(f¹) [But see, *ante*, 1728, note (j²), 1734, note (m¹).]

(g) *Dale v. Eyre*, 1 Wils. 306; 1 Saund. 207 a, note to *Salmon v. Smith*. But the misjoinder could not be so cured in an action on a contract. 1 Saund. 207 a, note. But it may be cured by amendment under the common law procedure act, 1852, s. 37.

If one of two executors dies, an action cannot be brought against the surviving executor and the executor of the deceased executor, but must be against the survivor alone. (*h*)

A defendant may be declared against as executor or * administrator, although the process only describes him generally. (*i*)

It seems doubtful whether the stat. 18 & 19 Vict. c. 67 (the summary procedure in bills of exchange act) applies where the defendant is sued as executor or administrator, as it gives only one form of judgment, which is a judgment against the defendant personally. (*k*)

Service on one of two co-executors, who were in possession of the premises, is a sufficient service in ejectment. (*l*)

In an action against an executor, as such, he must be named executor; (*m*) but if, upon the whole matter, the plaintiff has declared against the defendant as executor, the judgment may well be *de bonis testatoris*, although the defendant is not named executor at the beginning of the declaration. (*n*)

(*h*) 1 Roll. Abr. 928, tit. Exors. Z. But if the executor of the executor administer with the other, an action lies against both as executors. *Ib.*

(*i*) *Watson v. Pulling*, 3 Brod. & Bing. 4; S. C. 6 Moore, 66. [See *Duncan v. Duncan*, 4 Bennett (Miss.), 434; *Brockman v. M'Donald*, 16 Ill. 112.] It has been doubted, however, whether the service of a writ of summons, in which an executor is not described in his representative character, is notice to him of the commencement of an action against him in that character, so as to render him liable to a *devastavit*, if he pays debts of an equal degree with that sued for, between the service of the writ and filing the declaration. *Rees v. Morgan*, 5 B. & Ad. 1035; S. C. 3 Nev. & M. 205; *Tidd's New Pr.* 68; *ante*, 1033, note (*o*). [Writs of attachment and executions against executors and administrators, in Massachusetts, for debts due from the deceased testator or intestate, shall run only against the goods and estate of the deceased in their hands, and not against their bodies, goods, or estate. Genl. Sts. Mass. c. 128, § 5.]

(*k*) *Lush's Practice*, by Dixon, 1030.

(*l*) *Doe dem. Strickland v. Roe*, 4 D. & L. 431. [In an action against several executors or administrators in their representative capacity, service must be made upon all, to support a judgment against any of them; and if service is made only upon one, it is error to discontinue as to the other, and take judgment by default against him who was served with process. *Barnes v. Jarnagin*, 12 Sm. & M. 108.]

(*m*) *Com. Dig. Pleader*, 2 D. 2; [*Brown v. Hicks*, 1 Ark. 232; *McNeill v. Cook*, 33 Ala. 278.]

(*n*) *Dean of Bristol v. Guyse*, 1 Saund. 112 a; *Rann v. Hughes*, 4 Bro. P. C. 27, Toml. ed.; *Com. Dig. Abatement*, F. 20; *Ib. Pleader*, 2 D. 2. [So, on the other hand, it has been held that in case executors, who are sued, are not liable as such, but are liable in their individual capacities for the wrong or injury done and complained of, judgment may be rendered against them as individuals, although the declaration charges them as executors. *Baughner v. Wilkins*, 16 Md. 35; *Johnson*

Thus it is enough in an action of covenant on a demise to the testator, to state that he made his will and appointed the defendant *his executor*, who entered and was possessed *as executor*; for this averment may be traversed by the defendant. (o) how defendant to be charged as executor:

* The form of declaration given by sect. 26 of the stat. 8 & 9 Vict. c. 16 (companies clauses consolidation act) is not applicable to an action against the executors of a shareholder for calls made during his lifetime. (p)

In an action by a lessor against the executor of the lessee, for rent incurred in the testator's time, whether the action be in debt or covenant, the venue is transitory; Venue. and so it is in actions where the executor is sued, *as executor*, for rent incurred in his own time. But where he is sued in debt in the *debet* and *detinet*, or in covenant, as assignee, for rent incurred in his own time, the venue is local. (q)

v. Gaines, 8 Ala. 791. But see *Harrell v. Scudder*, 27 Ind. 499; *Harrell v. Mattingley*, 27 Ind. 500.]

(o) *Holliday v. Fletcher*, 2 Ld. Raym. 1510; S. C. 2 Stra. 781. So where the declaration stated that, on the death of the lessee, all his estate and interest in the lands came to and vested in L. and one M., since deceased, which said L. and M. were executrixes of the last will and testament of the lessee, by reason whereof L. and M., as executrixes as aforesaid, became and were possessed, &c.; it was objected, that this was not a sufficient allegation that the term vested in L. and M. as executrixes; but the court of common pleas held that there was no good ground of objection to this averment, which was in effect a conclusion of law, the term vesting *by law* in the personal representative, and the lessor having the right to sue the personal representative, on the covenant of the testator. *Ackland v. Pring*, 2 M. & Gr. 937. If the plaintiff declares in the *debet* and *detinet* against an executor or administrator, in cases where he ought to sue in the *detinet* only, the declaration is bad on demurrer; though it is aided by verdict. *Fruen v. Porter*, 1 Sid. 379. But no objection can be made to a

declaration in the *detinet*, which might, and strictly ought to be laid in the *debet* and *detinet*; for a party may abridge his demand, though he cannot extend it. *Wilson v. Hobday*, 4 M. & Sel. 120.

(p) *Birkenhead Railway v. Cotesworth*, 5 Ex. 226.

(q) *Hellier v. Casbard*, 1 Sid. 266; *Cornel v. Lisset*, 2 Lev. 80; 1 Saund. 241, note to *Thursby v. Plant*. [In Massachusetts, transitory actions, by or against executors or administrators, may be brought in any county in which such action might have been brought by or against the testator or intestate, at the time of his decease. St. Mass. 1865, c. 13. As to North Carolina, see *Stanley v. Mason*, 69 N. Car. 1. An executor cannot be compelled to appear and answer to a suit against him in a state where he has not taken out letters testamentary, nor done any official act. His power and liability are confined to the state in which he has taken out such letters; and the fact that process is served upon him in another state, while within the jurisdiction of the court from which it issued, does not make him amenable to its process in his representative capacity. *Security Ins. Co. v. Taylor*, 2 Biss. 446.]

A plaintiff cannot have an action against a defendant to charge him as executor, and also in his own right; for the judgment in the one case is *de bonis propriis*, and in the other *de bonis testatoris*. (r) And such misjoinder of action, as well against an executor as by him, (s) is a defect in substance, and, consequently, bad on a general demurrer, or arrest of judgment, or on error. (t) Therefore, a count for *money *had and received* by the defendant, as executor, for the plaintiff's use, (z) or for *money lent* to the executor, *as such*, (a) or for *interest*, alleging forbearance to the defendant as executor, *at his request*, (b) cannot be joined to a count on a promise made by the testator. (c) So a count upon a promise by the defendant, as executor, for *use and occupation* after the death of the testator, cannot be joined in the same declaration with a count upon promises by the testator to pay rent; inasmuch as the former count makes the defendant personally liable, whereas the latter makes him liable only to the extent of assets. (d) Again, a count for *goods sold* to, or *work done* for the defendant as executor, cannot be

(r) *Herrenden v. Palmer*, Hob. 88; *Hall v. Huffam*, 2 Lev. 288; [*ante*, 1872, and cases in note (x¹). A count on a promise by the testator may be joined with a count for the funeral expenses, alleging that they were incurred at the request of the executor, and that he, as executor, promised to pay therefor. *Hapgood v. Houghton*, 10 Pick. 154.]

(s) See *ante*, 1872.

(t) *Jennings v. Newman*, 4 T. R. 347; *Rose v. Bowler*, 1 H. Bl. 108; *Brigden v. Parkes*, 2 Bos. & Pull. 424; 2 Saund. 117 *h*, note; *Ib.* 210 *b*, note to *Foxwist v. Tremaine*. [See *Howard v. Powers*, 6 Ham. 92; *Fry v. Evans*, 8 Wend. 530; *Carter v. Phelps*, 8 John. 440. On a count stating a promise by an executor as such, the judgment must be entered *de bonis propriis*, and therefore such a count cannot be joined with one on an indebtedness of the testator. *Seip v. Drach*, 14 Penn. St. 352; *Moody v. Ewing*, 8 B. Mon. 521; *Benjamin v. Taylor*, 12 Barb. 328. And the objection may be taken on general demurrer to the whole declaration. *Godbold v. Roberts*, 20 Ala. 354.] And the court cannot award a *venire de novo*. Cor-

ner *v. Shew*, 4 M. & W. 163. If separate damages have been assessed on each count, the objection may be cured by entering a *nolle prosequi* as to the count which constitutes the misjoinder. See *Hayter v. Moat*, 5 Dowl. 298.

(z) *Ante*, 1774. See, also, *Parker v. Baylis*, 2 Bos. & Pull. 73; [*Moody v. Ewing*, 8 B. Mon. 521.]

(a) *Ante*, 1774.

(b) *Bignell v. Harpur*, 4 Ex. 773; *ante*, 1776.

(c) 2 Saund. 117 *h*, note.

(d) *Wigley v. Ashton*, 3 B. & Ald. 101. See, however, *Atkins v. Humphrey*, 2 C. B. 654; S. C. 3 D. & L. 312, where the plaintiff declared against A. and B. as executors, alleging that they, as executors, were indebted to him for the use and occupation of certain messuages *held* of him by them as executors under a demise to the testator, and that, in consideration of the premises, they, as executors, promised to pay; and it was held that this declaration disclosed a sufficient cause of action against them under the stat. 11 Geo. 2, c. 19, s. 14, in their representative character.

joined with a count for a debt due from the defendant in his representative capacity ; for since no goods can be sold to or work performed for another in his representative character, the claim in respect thereof is necessarily from the defendant in his own right. (e) If, in fact, the goods, or work, had been contracted for by the testator, and the contract completed by the plaintiff in the time of the executor, the declaration, instead of containing the common counts for goods sold to, and work done for, the executor, should state the contract to have been made with the testator, and that at the time of his death the work was incomplete, but was finished afterwards, and the defendant, as executor, then promised to pay. (f)

* But a count on an *account stated* with the defendant, as executor, whether the account be averred to have been stated of money *due from the testator* to the plaintiff, (g) or of money *due from the defendant as executor*, to the plaintiff, (h) may be joined to counts on promises made by the testator. And so may a count for *money paid* by the plaintiff to the use of the defendant *as executor*. (i) For these counts do not charge the defendant personally ; but he may plead *plene administravit* and the judgment is *de bonis testatoris*. (k) It must be observed, that whenever an executor or administrator is sued, upon promises by him in that character, the words “*as executor*” must be inserted in each count in stating the promise, and also in stating the debt, or cause of action, if it be laid to have accrued after the death of the testator or intestate. (l)

In a case (m) where an intestate had granted an annuity to the plaintiff, and after his death his administratrix procured it to be set aside for a defect in the memorial ; and the

when a
count for
money had

(e) *Corner v. Shew*, 3 M. & W. 350 ; *Phelps*, 8 John. 440 ; *Malin v. Bull*, 13 Serg. & R. 441 ; *M’Kinley v. Call*, 1 T.

(f) See *Werner v. Humphreys*, 2 M. & Gr. 857, note (a) ; [*Smith v. Proctor*, 1 Sandf. 72.] B. Mon. 54 ; *Vaughn v. Gardner*, 7 B. Mon. 326 ; *Howard v. Powers*, 6 Ohio, 92 ; *Reeve v. Cawley*, 17 N. J. (Law) 415 ;

(g) *Ante*, 1772, 1773.

(h) *Ante*, 1773.

(i) *Ante*, 1773.

(k) *Ante*, 1773. [A count on a promise by an executor or administrator as such, in which he is not charged as personally liable, may be joined with a count on a promise by the deceased. *Carter v.*

Bank of Pennsylvania v. Jacobs, 1 Penn. 161 ; *Benjamin v. Taylor*, 12 Barb. 328 ; *Strohecker v. Grant*, 16 Serg. & R. 237.]

(l) *Brigden v. Parkes*, 2 Bos. & Pull. 424 ; 1 Chit. Pl. 236, 5th ed. ; but see *ante*, 1874.

(m) *Churchill v. Bertrand*, 3 Q. B. 568.

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and received by the deceased can be employed:

plaintiff thereupon, in order to recover back the consideration money, brought *indebitatus assumpsit*, and declared against the administratrix in counts for money had and received *by the intestate* to the plaintiff's use, it was held, in accordance with *Cowper v. Godmond*, (n) that the money paid to the grantor of a defective annuity is not money had and received to the use of the grantee till the grantor has elected to vacate the annuity, and that then such election does not make the money had and received to the use of the grantee from the time of the grant by relation; and consequently that, in the present case, as the money could not be money had and received to the plaintiff's use until after the death of the intestate, it could not be money had and received *by him*, and that, therefore, the counts employed were not applicable.

* Where the nature of the whole claim set forth in the declaration is such as necessarily to make the defendant liable in what cases the words "as executor" in the declaration may be rejected. personally, and nevertheless he is charged *as executor*, those words may be struck out as surplusage. (o) But it should seem that this cannot be done in a case in which the defendant could, on any supposition, be liable in his representative character in respect of the contract declared on. (p)

In an action against an executor or administrator, the defendant may plead any matter which the testator or intestate might have pleaded; (q) and in addition thereto he may deny the character in which he is sued, by pleading *ne unques executor or administrator*; or admitting it, he may plead that he has no assets in his hands, and that either generally, or specially, or with the exception of assets to a certain amount, which are not sufficient to satisfy the plaintiff; or he may plead a retainer to pay his own debt of equal or superior degree, or debts

(n) 9 Bing. 748.

(o) *Wigley v. Ashton*, 3 B. & Ald. 101. [See *Braden v. Hollingsworth*, 8 Humph. 19; *Peters v. Heydenfeldt*, 3 Ala. 205; *Daviess v. Mead*, 2 Bibb, 397; *King v. Beeler*, 4 Bibb, 83; *Hood v. Link*, 2 B. Mon. 37; *Merritt v. Seaman*, 6 N. Y. 168.]

(p) 3 M. & W. 356. [When sued by a creditor, it is his duty so to plead as to protect the rights of all the creditors of the estate of whose demands he has no-

tice, according to their priorities as fixed by law; and if he fails to do so he becomes personally chargeable. *Davis v. Smith*, 5 Geo. 74; *Hatchcraft v. Tilford*, 5 Dana, 353. But he is not bound to litigate the title of his testator to goods claimed by third persons. He may exercise his discretion, and is not responsible, except he be guilty of negligence, collusion, or fraud. *Chappell v. Brown*, 1 Bailey (S. Car.), 528.]

(q) Com. Dig. Pleader, 2 D. 8.

of a superior degree due to third persons, on bonds or judgments, &c. (r)

In debt on simple contract, against executors or administrators, *non detinet* was formerly a good plea in all cases where nothing was due to the plaintiff at the time of commencing the action. (s) But now by Reg. Gen. Hil. T. 1853, r. 8, in every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded.

In debt on bond, if the executor pleads *non est factum suum*, it is good after verdict; for *suum* refers to the testator. (t) So, in an action of *assumpsit*, *non assumpsit* generally is a good plea, at least, after verdict; for it shall be referred to the testator. (u)

* Unless a *devastavit* is suggested, a plea by an executor or administrator of his own bankruptcy is not pleadable; as the proceedings in bankruptcy would not bind any effects, upon which, if the plaintiff obtained judgment and execution, the sheriff would have a right to levy under a *fi. fa.* (x) In *Serle v. Bradshaw*, (y) a defendant, in an action against him as administrator, being under terms to plead issuably, pleaded *plene administravit* and his own bankruptcy. And the barons of the exchequer held that the plaintiff might sign judgment as for want of a plea, on the ground that the plea of bankruptcy could not possibly be good, if the plea of *plene administravit* were true.

If there are several executors, they may plead different pleas; and that which is most to the testator's advantage shall be received. Therefore, in an action of *assumpsit* against four executors, upon a promise made by the testator, if one executor acknowledges the action, and the other three plead *non assumpsit*, their plea shall be received. (z) Hence, if a war-

(r) Tidd, 644, 9th ed.

(s) Ib. 648; Com. Dig. Pleader, 2 W. 17.

(t) Baker's case, Latch, 125; Com. Dig. Pleader, 2 D. 8.

(u) *Browning v. Litton*, 1 Lev. 184; S. C. 1 Sid. 222. [In an action against an executor for a debt due from the testator, the plea of *non est factum*, or *non assumpsit*, is an admission of a will, of which the

defendant is executor; but it is otherwise where the action is for a demand for which the testator was not liable, as for a legacy, *Hantz v. Sealy*, 6 Binn. 405.]

(x) See *ante*, 637.

(y) 2 Cr. & M. 148; S. C. 4 Tyrwh. 69; 2 Dowl. 289.

(z) *Chaffe v. Kelland*, 1 Roll. Abr. 929, tit. Exors. A. pl. 1; Wentw. Off. Ex. 212, 14th ed.; *Elwell v. Quash*, 1 Stra. 20;

rant of attorney be given by one of several executors to confess judgment against them all, the courts will order it to be delivered up. (a) So where one executor pleaded a good plea, and the other a bad one, on demurrer, judgment was given in C. B. for both the defendants; but it was reversed on error, and a new judgment given for the plaintiff against one executor only. (b)

Where several executors plead a release to the testator or to themselves, and one of them afterwards makes default, this shall not be a total default in the defendants, so as to induce a judgment against them. (c)

* If the defendant intends to deny his being executor or administrator, he must plead such denial specially; otherwise he will admit his representative character. (c¹) The plea of *ne unques executor* or *ne unques administrator* is a plea in bar. (d) But a plea, to an action brought against the defendant as executor, that he is administrator and not executor, is a plea in abatement only. (e) So, in an action against the defendant as administrator, a plea that he is not administrator but executor can only be in abatement. (f) So, if he be sued as administrator generally, he must plead in abatement that he is administrator only *durante minoritate*. (g)

[Huston J. in *Lyon v. Allison*, 1 Watts, 172.] So if two executors have judgment, and the one prays a *capias*, and the other a *fieri facias*, the *capias* shall be awarded, as best for the testator. *Foster v. Jackson*, Hob. 61, cited as the opinion of Co-tismore in 7 H. 6, 6. [In an action against two executors for a legacy, one of them may separately plead *plene administravit*; and if it be found for him, judgment will be rendered in his favor, and the plaintiff may recover from the other. *App v. Dreisbach*, 2 Rawle, 287; *Geddis v. Irvine*, 5 Penn. St. 308.]

(a) *Elwell v. Quash*, 1 Stra. 20; *Tidd*, 548, 9th ed.

(b) *Baldwin v. Church*, cited 1 Stra. 20.

(c) *Wentw. Off. Ex.* 213, 14th ed.

(c¹) [*Lomax v. Spierin*, *Dudley* (S. Car.), 365; *Railroad Co. v. Joyce*, 8 Rich. (S. Car.) 117.]

(d) *Com. Dig. Pleader*, 2 D. 7; [*Shown v. Barr*, 11 Ired. 296; *Cain v. Haas*, 18 Texas, 616; *The Governor v. Evans*, 1

Ark. 349; *Finn v. Chase*, 4 Denio, 85; *Codding v. Whitaker*, 5 Blackf. 470. In *Langford v. Frey*, 8 Humph. 443, it was held that a defendant sued as executor, on an obligation of the deceased, may plead *ne unques executor*, and *non est factum*.]

(e) *Pyne v. Wolland*, 2 Ventr. 178; *Harding v. Salkill*, 1 Salk. 296; *Granwell v. Sibly*, 2 Lev. 190; *Com. Dig. Pleader*, 2 D. 3, 2 D. 7. In such a plea he must show that the administration is well granted to him. *Com. Dig. Pleader*, 2 D. 4. But he need not traverse *absque hoc* that he administered as executor; for this is more proper for the other side; nor that he was made executor. *Com. Dig. Pleader*, 2 D. 4.

(f) *Com. Dig. Abatement*, F. 20, *Pleader*, 2 D. 12. In this plea the defendant must traverse *absque hoc* that the deceased died intestate. *Com. Dig. Pleader*, 2 D. 4.

(g) *Little v. Plant*, 1 Lutw. 20; *Com. Dig. Pleader*, 2 D. 12.

On the trial of an issue joined on a plea of *ne unques executor* or *administrator*, the *onus* of proof is on the plaintiff, who has to prove the affirmative of the proposition. (*g*¹)

Proof that the defendant has intermeddled with the property, so as to make himself executor *de son tort* (*h*) is sufficient proof of his being executor. (*i*)

* It is said that it seems to be now settled, that the plaintiff would fail on an issue joined on the plea of *ne unques executor*, unless he could prove, not only the appointment of the defendant as executor, but also that he has taken upon himself to act as such, or has proved the will. (*k*) But it is laid down, in a book of authority, that an executor who proves the will, though he does not otherwise administer, cannot plead *ne unques executor*. And that, if there be two executors, and one proves it in the name of both, even against the will of the other, yet he cannot plead *ne unques executor* nor administer as executor. (*l*)

For the purpose of introducing formal and documentary evidence of the defendant being executor or administrator, it is always prudent, and in some cases absolutely necessary, to give notice to the defendant to produce at the trial the probate of the

(*g*¹) [See *Travers v. Boykin*, 6 Ala. 355.]

(*h*) As to the acts by which a person will make himself executor *de son tort*, see *ante*, 257.

(*i*) See *ante*, 265; [*Witcher v. Wilson*, 47 Miss. 663.] Besides, the plea of *ne unques executor* must go on to allege that the defendant never administered as executor; so that, in the case put, this latter part of the plea is found untrue. *Wentw. Off. Ex. c. 15*, p. 339, 14th ed. (But see *Scott v. Wedlake*, 7 Q.B. 780, 781, by Tindal C. J.) So to a plea *ne unques executor*, the plaintiff may reply that the defendant has administered; *Keble v. Keble*, Hob. 49; *Com. Dig. Pleader*, 2 D. 7; or that goods of the testator to a certain value came to the defendant's hands before administration granted. *Kellow v. Westcombe*, 1 Freem. 122; S. C. 3 Keb. 202; *Hinde v. Skelton*, 34 L. J. N. S. Ch. 378; 2 Hemm. & M. 690. As to the proper plea by an executor who has administered under a will, which has been

afterwards disproved, see *ante*, 258, note (*l*).

(*k*) 2 Phill. Ev. 363, 7th ed., citing *Douglas v. Forrest*, 4 Bing. 704; *Cottle v. Aldrich*, 1 Stark. N. P. C. 38; S. C. 4 M. & Sel. 175; *Atkins v. Tredgold*, 2 B. & C. 30; [*Witcher v. Wilson*, 47 Miss. 663.]

(*l*) *Com. Dig. Pleader*, 2 D. 7. See, also, *Wentw. Off. Ex. c. 15*, p. 339, 14th ed. The author of the latter work expresses his opinion, that even in the case of a sole executor, who has refused before the court of probate, he cannot safely plead *ne unques executor*; since he so was executor before his refusal, that he might have released all debts due to the testator, and given away all his goods; and, therefore, he must plead specially, showing his refusal, and not generally deny his being executor. But where the plaintiff declares on promises by the defendants *as executors*, the mere naming of one of them in the will is not enough to prove him executor. See the judgment of Holroyd, J. in *Atkins v. Tredgold*, 2 B. & C. 30.

will, or the letters of administration. (*m*) But it is not also necessary, in order to let in secondary evidence, to prove that the probate or letters are in the defendant's possession; for if he has been duly appointed executor or administrator, they must necessarily be presumed to be in his possession. (*n*) Some evidence of the identity of the party, namely, that the person, described in the documentary * evidence as executor or administrator, is the party sued, will be indispensably necessary. (*o*)

The plea of *ne unques executor* or *administrator* does not deny the cause of action, but only that the defendant is one of the representatives of the testator or intestate. (*p*) Therefore, where in *assumpsit* against two defendants as executors there was a plea by both of *ne unques executors*, and it appeared in evidence that one of the defendants was executor, and the other was not, it was held that the plaintiff might, upon counts laying promises by the testator, take a verdict against the former defendant alone, and the latter defendant must be discharged; although as to the counts which laid the promises by the defendants as executors, the plaintiff must fail altogether. (*q*) So if, in an action against several executors one of the defendants plead severally *ne unques executor*, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others. (*r*)

Hence it follows that a plea by one of two persons charged as executors, that the other is not executor, is bad. (*s*)

If the defendant, being sued as administrator, pleads, that before the date of the writ, his administration was revoked and granted to another, he ought to allege that he has fully administered all the goods in his hands, or else that he has delivered them over to the new administrators. (*t*)

Accordingly, if an administrator wastes the goods, and afterwards administration is committed to another, yet any creditor may charge him in debt, and if he pleads the last administration com-

(*m*) 2 Phill. Ev. 346, 6th ed.

(*n*) 2 Phill. Ev. 347, 6th ed.

(*o*) 2 Phill. Ev. 347, 6th ed.

(*p*) 1 Saund. 207 a, note to Salmon v. Smith.

(*q*) Griffith v. Franklin, Mood. & M. 146. See, also, Atkins v. Tredgold, 2 B. & C. 30, by Holroyd J.

(*r*) 1 Saund. 207 a, note.

(*s*) Atkins v. Humphrey, 2 C. B. 654. S. C. 2 D. & L. 312.

(*t*) Garter v. Dee, 1 Freem. 13; ante, 594. These goods, as in the case of goods possessed by an executor *de son tort*, shall not be assets in the hands of the new administrator, until they come to his possession. *Ib.*; Keble v. Keble, Hob. 49.

mitted to another, the other may reply that * before the second administration committed, he had wasted the goods. (u)

If an action be brought on a debt, which the testator or intestate contracted more than six years before the commencement of the suit, (u¹) and the plaintiff means to rely upon a promise by the executor or administrator, to

plea of the statute of limitations:

(u) Packman's case, 6 Co. 18 b.

(u¹) [In Massachusetts, in addition to the general statutes of limitation, provision is made that no executor or administrator, after having given the required notice of his appointment, shall be held to answer to the suit of any creditor of the deceased, unless it is commenced within two years from the time of giving bond, except in certain specified cases. Genl. Sts. Mass. c. 97, § 5. *Bacon v. Pomeroy*, 104 Mass. 583. See *ante*, 1803, note (q); *Cooper v. Cherry*, 8 Jones (Law), 323; *Kelly v. Hooper*, 3 Yerger, 395; *Stillman v. Young*, 16 Ill. 318; *Bryan v. Mundy*, 17 Missou. 556. No disability of the creditor, as by infancy, during the two years, will prevent his claim from being barred under this statute. *Hall v. Bumstead*, 20 Pick. 2, 8. An executor *de son tort* is liable on a cause of action existing against the debtor at his decease, until the action is barred by the special limitation of time after a lawful grant of administration. *Brown v. Leavitt*, 26 Miss. 493. It is the duty of an executor or administrator to plead this statute of limitation in bar of any action brought against him after the time limited. *Ante*, 1803, note (q). He may plead it in answer to claims in set-off filed after the expiration of the two years. *Ante*, 1876, note (o¹). When an estate is represented insolvent, the presentation of the claim of a creditor to the commissioners appointed to examine the claims of creditors, or to the court, when it takes that duty upon itself, will be a sufficient commencement of a suit to prevent such claim from being barred under this statute. See *Aiken v. Morse*, 104 Mass. 277, 279, 281; *Bacon v. Pomeroy*, 104 Mass. 583; *ante*, 1915, note (o¹). In cases where it is required by statute that claims against an

estate shall be presented to the executor or administrator thereof for payment, within a stipulated period, and be sued within a certain time, the requirements of the statute must be strictly observed, in order to enable the creditor to maintain an action thereon. *Badger v. Kelly*, 10 Ala. 944; *Jones v. Pharr*, 3 Ala. 283; *Starke v. Keenan*, 5 Ala. 590; *King v. Mosely*, 5 Ala. 610; *Cawthorne v. Weissinger*, 6 Ala. 714; *Ready v. Thompson*, 4 Stew. & Port. 52; *Thurston v. Lowder*, 47 Maine, 72; *Walker v. Byers*, 14 Ark. 246; *Bennett v. Dawson*, 15 Ark. 412; *Ryan v. Jones*, 15 Ill. 1; *Wingate v. Pool*, 25 Ill. 118; *Preston v. Day*, 15 Iowa, 127; *Bemis v. Bemis*, 13 Gray, 559; *French v. Davis*, 38 Miss. 218; *Walker v. Cheever*, 39 N. H. 420; *Cutter v. Emery*, 37 N. H. 567; *Stanfield v. Neill*, 36 Texas, 688; *Cotton v. Jones*, 37 Texas, 34; *Scovil v. Scovil*, 45 Barb. 517; *Barsalow v. Wright*, 4 Bradf. Sur. 164; *Hubbard v. Marsh*, 7 Ired. (Law) 204; *Harter v. Taggart*, 14 Ohio St. 122; *Demmy's Appeal*, 43 Penn. St. 155; *New England Bank v. Newport &c. Co.* 6 R. I. 154; *Trott v. West*, 9 Yerger, 433; *Allen v. Farrington*, 2 Sneed (Tenn.), 526; *Maynard v. May*, 2 Coldw. 44; *Jennings v. Bowder*, 24 Texas, 192; *Manus v. Flynn*, 10 Leigh, 93; *Sugar River Bank v. Fairbanks*, 49 N. H. 140; *Ticknor v. Harris*, 14 N. H. 272. The burden is on plaintiff in New Hampshire to show that he has exhibited demand against deceased, to his executor or administrator, before action against the latter. *Mathes v. Jackson*, 6 N. H. 105. Although in Illinois the claim of a creditor of an estate should be barred by reason of its not having been exhibited within the two years, he is still entitled to participate in any estate not inventoried or accounted for

take the case out of the statute of limitations, the declaration should contain a count or counts upon promises by the executor or

within that time. *Stone v. Clark*, 40 Ill. 411; *Bradford v. Jones*, 17 Ill. 93. So in Massachusetts, when assets come to the hands of an executor or administrator after the expiration of two years, he shall be liable for the same, in like manner as if they had been received within that time; he will be liable to an action at law, or to any suit or process in the probate court, on account of such new assets, by or for the benefit of any creditor, in like manner as if the assets had been received within the two years, if such action or proceeding is commenced within one year after the creditor has notice of the receipt of such new assets, and not more than two years after the same are actually received. Genl. Sts. Mass. c. 97, § 6; *Bradford v. Forbes*, 9 Allen, 365; *Chenery v. Webster*, 8 Allen, 76; *White v. Swain*, 3 Pick. 365; *Robinson v. Hodge*, 117 Mass. 222; *Sturtevant v. Sturtevant*, 4 Allen, 122; *Veazie v. Marrett*, 6 Allen, 372; *Alden v. Stebbins*, 99 Mass. 616; *Welsh v. Welsh*, 105 Mass. 229, 231; *Thurston v. Lowder*, 47 Maine, 72; *McLellan v. Lunt*, 11 Maine, 150; *ante*, 1679, note (x). Provision is also made for the case of a creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond, in Genl. Sts. Mass. c. 97, § 8. See *Bacon v. Pomeroy*, 104 Mass. 577, 584. It is also provided that an administrator *de bonis non* shall be liable to the actions of creditors for two years after he has given bond, unless the same were barred prior to the termination of the previous administration. Genl. Sts. Mass. c. 97, § 12. And a like provision is made, for the case where new assets come to the hands of such administrator *de bonis non*, as for the case of new assets coming to the hands of the original executor or administrator. Genl. Sts. Mass. c. 97, § 14. See *Veazie v. Marrett*, 6 Allen, 372; *Fisher v. Metcalf*, 7 Allen, 209; *Chenery v. Webster*, 8 Allen, 76. No executor or administrator, in Massachusetts, can be held to

answer to the suit of a creditor of the deceased, if commenced within one year after he gives his bond, unless it is for a demand that would not be affected by the insolvency of the estate, or unless it is brought after the estate has been represented insolvent, for the purpose of ascertaining a contested claim. Genl. Sts. Mass. c. 97, § 16. See *Holden v. Fletcher*, 6 Cush. 235; *Walker v. Walker*, 9 Wallace, 743. An action was brought upon a general debt of a testator, against his executor in his representative capacity. The executor, who was also residuary legatee and had given bond to pay debts and legacies, was subsequently removed, and an administrator *de bonis non* was appointed. The answer of the executor set up merely his removal and that he ought not to be held to answer; it was held that the administrator *de bonis non* was properly allowed to come in and take upon himself the defence of the action, and to file an answer setting up that it was brought within one year from the giving of the bond by the executor; and that this fact, if proved, was a defence to the action. *National Bank of Troy v. Stanton*, 116 Mass. 435; *Ferrand v. Walker*, 5 Blackf. 424; *Granjang v. Merkle*, 22 Ill. 249. As to the force of the expression "a demand that would not be affected by the insolvency of the estate," in the above statute, see the suggestions of Gray C. J. in *National Bank of Troy v. Stanton*, 116 Mass. 439; *Johnson v. Ames*, 11 Pick. 173, 181. As to the plea by administrators that they were not liable to be sued within a fixed period after the death of the intestate, with an averment that the action was commenced within that time, see *Carson v. Bryant*, 2 Brevard, 159; *Reed v. Armistead*, 31 Miss. 353; *Ferrand v. Walker*, 5 Blackf. 424. In *Amoskeag Manuf. Co. v. Barnes*, 48 N. H. 25, 29, it was held that the fact that the action was prematurely brought against an executor, being within one year from the granting of administration,

administrator, as such. (*x*) And accordingly, if an action is brought against an executor or administrator on a bill or note given by the testator or intestate, and the declaration alleges a promise by the defendant to pay the bill or note, such promise may be denied by a plea of *non assumpsit*, notwithstanding the new rule abolishing the plea of *non assumpsit* to a declaration on a bill or note. (*y*) However, it is said to have been held, (*z*) that if the declaration charge the defendant, executor, on a promise made by his testator, and the defendant plead the statute of limitations, to which the plaintiff replies, that the testator did promise within six years; proof on the part of the plaintiff, that the executor promised within six years, and that the testator's death was within this period, will support the count in the declaration; for that the executor's promise shows a liability to pay, existing before the time of the testator's death, and the law will imply a promise by the testator to pay what he was liable to pay. (*z*¹)

But it must be observed, that the mere existence of a debt owing by the testator or intestate, is not evidence of a promise to pay *by the executor* or administrator, as executor or administrator. (*a*) Hence, as against an executor or administrator, an acknowledgment merely by him of the debt's existence is not sufficient to take the case out of the statute; (*a*¹) *there must be an express promise. (*b*) Accordingly, in *Tullock v. Dunn*, (*c*) which

must be pleaded in abatement and not in bar; and for this reason, that this is no bar to the claim but only a suspension of the right of action. An administrator *de bonis non* is obliged to defend at any time after the expiration of a year from the date of the appointment of the first administrator. *Cooley v. Patterson*, 49 Maine, 570.]

(*x*) See *Browning v. Paris*, 5 M. & W. 120, per Parke B. [But see *Buswell v. Roby*, 8 N. H. 467.]

(*y*) *Rolleston v. Dixon*, 2 Dowl. & L. 892; *ante*, 1880.

(*z*) *Poile v. —*, Exor. Sitt. after Tr. T. 1823, *coram* Abbott C. J. 2 Phill. Ev. 351, 6th ed. But this case is omitted in the seventh edition.

(*z*¹) [See *Benjamin v. De Groot*, 1 Denio, 151.]

(*a*) *Atkins v. Tredgold*, 2 B. & C. 28, by Abbott C. J.

(*a*¹) [*Knox v. M'Call*, 1 Brevard, 531; *Moore v. Parcher*, 1 Bailey Eq. 195. But it has been held in New Hampshire that an admission by an administrator of an existing debt of the intestate, which the administrator was liable and willing to pay, is competent and *prima facie* evidence of a new promise, and takes the claim out of the operation of the general statute of limitations, and part payment is universally recognized as such an admission. *Foster J. in Brewster v. Brewster*, 52 N. H. 52, 60; *Hale v. Roberts*, cited in *Buswell v. Roby*, 8 N. H. 468; *Hodgdon v. White*, 11 N. H. 211.]

(*b*) *Tullock v. Dunn*, Ryan & M. 417; [*ante*, 1803, note (*q*); *Peck v. Botsford*, 7 Conn. 172; *Hammon v. Huntley*, 4 Cowen,

(*c*) Ryan & M. 416.

was an action of *assumpsit* against several executors, who pleaded the general issue and the statute of limitations, Abbott C. J. held, that neither an acknowledgment of the debt by all the executors, nor an express promise by one of them, took the case out of the statute; there ought to have been an express promise by all. (*d*)

And now by stat. 9 Geo. 4, c. 14, s. 1, after reciting the statute of limitations, 21 Jac. 1, c. 16, and the Irish act, 10 Car. 1, it is enacted, that "in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; (*e*) and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." (*f*)

493; *Cayuga Bank v. Bennett*, 5 Hill, 236; *Forsyth v. Ganson*, 5 Wend. 558; *Oakes v. Mitchell*, 15 Maine, 360; *McIntire v. Morris*, 14 Wend. 90. But see *Townes v. Ferguson*, 20 Ala. 147; *Buswell v. Roby*, 3 N. H. 467; *Deyo v. Jones*, 19 Wend. 491; *Chambers v. Fennemore*, 4 Harring. 368; *Buchanan v. Buchanan*, 4 Strobb. 63; *M'Whirter v. Johnson*, 10 Humph. 209; *F. & M. Bank v. Leath*, 11 Humph. 515.]

(*d*) See, also, 12 M. & W. 514, per Parks B. accord. At all events the promise or payment of the executor, in order to bind his co-executor, must appear to have been made by him in his character of executor. *Scholey v. Walton*, 12 M. & W. 510. [It has been held in New Jersey, that a sole executor has the power by a new promise to remove the bar of the statute of limitations; and so may all of several executors. So may one of two or

more executors bind an estate by the new promise, and it does not make the representatives personally liable. *Shreve v. Joyce*, 7 Vroom, 44. See, in this case, the remarks of the court upon *Tullock v. Dunn*, and *Scholey v. Walton*; and the decisions of other states referred to upon the point. See *Head v. Mannin*, 5 J. J. Marsh. 255; *Hord v. Lee*, 2 Monr. 131; *Emerson v. Thompson*, 16 Mass. 429; *Johnson v. Beardslee*, 15 John. 3; *Cann v. Sloan*, 25 Md. 575.]

(*e*) Extended to writings signed by stat. 19 & 20 Vict. c. 97, s. 13.

(*f*) In an action by an administratrix, to which the statute of limitations was pleaded, it appeared that the cause of action arose more than six years before, but that within six years the defendant and the agent of the plaintiff had gone over the items of the account, and struck a balance,

* But it is also provided by the same section, that "in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiff."

With regard to the payment of principal or interest, it was held that a payment by one of the makers of a joint and several promissory note took the case out of the statute, in the same manner as before the statute 9 Geo. 4. (*g*)

But now by the 14th section of the stat. 19 & 20 Vict. c. 97 (mercantile law amendment act), "where there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor * or co-debtor, executor or administrator, shall lose the benefit of the [statute of limitations],

which the defendant promised verbally to pay; it was objected that this was within the 9 Geo. 4, c. 14. But Vaughan B. said, "I think the plaintiff has shown a good cause of action upon the count on an account stated. She does not go upon the original debt at all. I take the statute to apply in cases where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption raised by the statute of limitations, that the debt has been satisfied." *Smith v. Forty*, 4 C. & P. 126. See, also, *Ashby v. James*, 11 M. & W. 542, accord. [Executors and administrators cannot, by any promise in writing or otherwise, or by any part payment, take any claim out of the operation of the statute limiting the time for bringing actions against executors and administrators specially, nor are they at liberty to omit to plead their statute of limitations, in any case where it is applicable. See *ante*, 1803, note (*q*),

1946, note (*u*¹); *Brewster v. Brewster*, 52 N. H. 52, 60. And it has been held that an administrator cannot revive a claim against the estate of the deceased, which was barred by the statute before his decease. *Moore v. Parker*, 1 Bailey Eq. 195. See *ante*, 1804, note (*x*); *Patterson v. Cobb*, 4 Florida, 481.]

(*g*) By Parke J. in *Chippendale v. Thurston*, Mood. & M. 411; *Wyatt v. Hodson*, 8 Bing. 309. This was by reason of the proviso that the act shall not lessen the effect of any payment, &c. See, also, *Burleigh v. Stott*, 8 B. & C. 36; *S. C.* 2 Mann. & R. 93; *Channel v. Ditchburn*, 5 M. & W. 494; *Goddard v. Ingram*, 3 Q. B. 839. But an acknowledgment by one only of two joint mortgagees does not entitle the mortgagor to redeem where the mortgagees have been in possession for more than twenty years. *Richardson v. Younge*, L. R. 10 Eq. Ca. 275.

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or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors or administrators." (h)

But independently of this enactment where an action is brought against the executor of a deceased contractor, a payment by a surviving joint contractor, made *after the death of the testator*, will not take the case out of the statute. Thus, in *Atkins v. Tredgold*, (i) A. and B. made a joint and several promissory note. A. died, and ten years after his death B. paid interest upon the note. In an action brought upon the note against the executors of A., it was held that the payment of interest by B. did not take the case out of the statute of limitations, so as to make A.'s executors liable. Nor will it make any difference that the surviving joint contractor is the executor of the deceased; for it is clear that acts done by a surviving partner, who is executor of the deceased partner, and which the surviving partner was in that character bound to do, cannot, *prima facie*, be considered to have been done in the character of executor. (k) Again, where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representative of the deceased to take the case out of the statute as against the survivor. (l) Therefore, in *Slater v. Lawson*, (m) it was holden that after the death of one maker of a joint and several promissory note, signed by two, a payment upon it by the executor of the deceased *party would not take the debt out of the statute of limitations as against the survivor.

In *Douglas v. Forrest*, (n) an action was brought against an executor on a Scotch judgment recovered against his testator. The defendant, after pleading the general issue, pleaded, that the plaintiff's cause of action did not accrue within six years before the commencement of the suit. To this there was a replication, that the deceased, at the time the action accrued, was beyond seas,

(h) This enactment is not retrospective. *Jackson v. Woolley*, 8 El. & Bl. 778, 784. Since the act, payment by one co-contractor, though made with the knowledge and consent of another, will not avail to take the case out of the statute of James as to the latter. *Ib.* [For similar statute in Massachusetts, see Genl. Sts. Mass. c. 155, § 14.]

(i) 2 B. & C. 23.

(k) *Way v. Bassett*, 5 Hare, 55; *Brown v. Gordon*, 16 Beav. 302. But see *Braithwaite v. Britain*, 1 Keen, 206; *Griffin v. Ashley*, 2 Carr. & Kirw. 139.

(l) 1 B. & Ad. 398.

(m) 1 B. & Ad. 396.

(n) 4 Bing. 686; S. C. 1 M. & P. 663.

and remained there till he died, and that the plaintiff sued out his writ against the defendant within six years after he first took on himself the burden and execution of the will. And it was holden that this replication was a good answer to the plea, the court being of opinion, that although the injury of which the plaintiff complained had existed more than six years, yet he had no "cause of action" until there was some person within the realm against whom the action could be brought; and that, as the deceased never was in England after the cause of action accrued against him, there was no person in England against whom the plaintiff could proceed until the defendant took upon him the execution of the will. (*o*)

* But it is no answer to a plea of the statute of limitations, that, after the cause of action accrued, and after the statute had begun to run, the debtor, within the six years, died, and that (by reason of litigation as to the right to probate) an executor of his will was not appointed, until after the expiration of the six years, and that the plaintiff sued such executor within a reasonable time after probate granted. (*o*¹) For as soon as there is a cause of action, a plaintiff that can sue and a defendant that can be sued in England, from that time the date of six years begins to run; and when the statute once begins to run, it must continue to run. (*p*)

(*o*) See, also, *Story v. Fry*, 1 Y. & Coll. C. C. 603, accord. [See *Benjamin v. De Groot*, 1 Denio, 151.] It must be observed that it seems to have been the better opinion, that the exception in the statute 21 Jac. 1, c. 16, in favor of persons being beyond sea, extends only to the case where the *creditors* or *plaintiffs* were so absent, and not where the *debtors* or *defendants* were; because *creditors* are only mentioned in the statute. *Hall v. Wyborn*, 1 Show. 99; 2 Saund. 121 *b*, note (4). But now by the statute 4 Ann. c. 16, s. 19, it is enacted, that if any person *against whom* any action lies for seaman's wages, trespass, detinue, trover, replevin, action of account, or upon the case (or other actions mentioned in 21 Jac. 1, c. 16, s. 3), was beyond sea at the time that such action accrued, the *plaintiff* shall be at liberty to bring his action against him

within the same time after his return as is limited for such action by the statute of 21 Jac. 1, c. 16, and 4 Ann. c. 16. The latter statute, however, does not appear to have been relied on either by the counsel or court, in the above case of *Douglas v. Forrest*. But the decision is stated by Lord Denman in delivering the judgment of the court of exchequer chamber, in *Rhodes v. Smethurst*, 6 M. & W. 353, to have proceeded on the equity of that statute. See, further, as to the construction of the statute of Anne, *Towns v. Mead*, 16 C. B. 123.

(*o*¹) [But see *Boyce v. Foote*, 19 Wisc. 199; *Conant v. Hilt*, 12 Vt. 285.]

(*p*) *Rhodes v. Smethurst*, 4 M. & W. 42, affirmed in the exchequer chamber, 6 M. & W. 351; S. P. in equity, *Freaker v. Cranefeldt*, 3 My. & Cr. 499. [See *Mann v. Warner*, 4 Whart. 455; *Warren v. Paff*,

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Although, where the plaintiff dies, a writ by journey's accounts cannot be brought by his executor, (*q*) yet if a *defendant* dies, the plaintiff may pursue this writ against the personal representative, provided the action be of a nature such as will survive against an executor or administrator; (*r*) and in such case, if the defendant pleads the statute of limitations, the plaintiff may reply a writ newly brought by journey's accounts; (*s*) and the executor of an executor must plead that he had fully administered on the day of the first writ purchased. (*t*) So if the plaintiff commenced

4 Bradf. Sur. 260; *Hapgood v. Southgate*, 21 Vt. 584. It is provided by the New York code of procedure that if a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executor or administrator, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration. Code of Pro. § 102. See *Scovil v. Scovil*, 45 Barb. 517. For a similar provision in the statutes of Massachusetts, see *ante*, 1880, note (*e*). The special statute limiting the time for bringing actions against executors and administrators will not run against creditors while administration is suspended on account of the neglect of an executor or administrator to file a proper bond; *Morgan v. Dodge*, 44 N. H. 255; *Abercrombie v. Sheldon*, 8 Allen, 532; nor while the executor or administrator neglects to give the notice required by the statute; *Aiken v. Morse*, 104 Mass. 277; *Clark v. Collins*, 31 Misson. 260; *Clark v. Sexton*, 23 Wend. 477; *Hardy v. Ames*, 47 Barb. 413; *Murray v. Smith*, 9 Bosw. 689; *Smith v. Hall*, 19 Cal. 85; *Bond v. Allen*, Mart. (N. Car.) 83; *Emerson v. Thompson*, 16 Mass. 429, 432; nor during the period of an administration which is revoked upon the discovery of a will of the deceased; the statute of limitations in such case begins to run against claims upon the estate from the time of the qualification of the executor named in the will, or of the administrator with the will annexed, and not from

the time of the grant of the former administration. *Manns v. Flynn*, 10 Leigh, 93. Lapse of time will not bar the debt so long as the estate is unadministered and the trust subsists. Foster J. in *Brewster v. Brewster*, 52 N. H. 52, 59; *McCandless's Estate*, 61 Penn. St. 9. "Similar reasons and considerations," says Mr. Justice Foster, in *Brewster v. Brewster*, 25 N. H. 59, 60, "must uphold the converse of this proposition, calling for the suspension of the operation of the statute during the period when, letters of administration upon the estate of the creditor not having been taken out, there is no representative of the creditor entitled to bring suit. And such considerations, doubtless, led to the enactment of the seventh section of the statute referred to," to wit, Genl. Sta. N. H. c. 179, § 7, which enacts that "if any right of action existed against or in favor of the deceased at the time of his death, and survives, an action may be brought by or against the administrator at any time within two years after the original grant of administration." See *ante*, 1880, note (*d*).]

(*q*) See *ante*, 1882, note (*m*), for an account of this writ.

(*r*) *Kinsey v. Hayward*, 1 Ld. Raym. 432. But there is some conflict between the authorities on this point. See the judgment of Lord Lyndhurst, in *Davies v. Lowndes*, 6 M. & Gr. 534; 1 Phill. C. C. 340.

(*s*) 1 Ld. Raym. 432; Com. Dig. Abatement, P.

(*t*) *Spencer's case*, 6 Co. 10 b; Doct. Plac. Exors. 2, p. 170, ed. 1677.

an action against the deceased within six years of the accruing of the cause of action, and such action abated by his death, a reasonable time is allowed to the executor * for bringing a fresh action either according to the principle of the old writ by journey's accounts, or according to an equitable construction of the 4th section of the statute. (u) And the executor, if he use due diligence, is not bound to bring the action within a year from the death of the deceased, *e. g.* if the defendant has made it impossible to do so by delaying to take out administration. (v) The same equitable construction has been applied to the limitation of actions on bonds, &c. imposed by the statute 3 & 4 W. 4, c. 42, s. 3. (x)

A defendant, sued as executor or administrator, cannot set off a debt due to himself personally; nor, if sued for his own debt, can he set off what is due to him as executor or administrator; because the debts sued for, and intended to be set off, must be mutual, and due in the same right. (y) But it has been held that to a declaration in debt or assumpsit against an executor, or an account stated by him *as executor*, a set-off for debts due from the plaintiff to the testator may well be pleaded; for that an account stated by an executor as such must be taken to show a debt due from his testator to the plaintiff. (z)

Whenever a tender, with *tout temp prist*, is pleaded by an executor or administrator, he must allege that his testator or intestate was at all times, from the time of making the * promise to the time of his death, ready to pay, and that he, the defendant, has, at all times since the death of his testator or intestate, been ready to pay. (a)

If the executor or administrator has not assets to satisfy the debt, upon which an action is brought against him,

(u) See *ante*, 1883-1885.

(v) *Curlewis v. Mornington*, 7 El. & Bl. 283; S. C. in error, 27 L. J. Q. B. 489.

(x) *Sturgis v. Darell*, 4 H. & N. 622; S. C. in error, 6 H. & N. 120.

(y) *Bishop v. Church*, 3 Atk. 691; *Gale v. Luttrell*, 1 Y. & Jerv. 180. See *ante*, 1876.

(z) *Blakesley v. Smallwood*, 8 Q. B. 538; 11 Ex. 416. But it may be argued that the debt, on which the action is founded, is the debt which arises, after the death of the testator, on the account stated between the executor and the plain-

tiff; and that, therefore, in truth, this case, as well as *Mardall v. Thelluson*, 18 Q. B. 857, 6 El. & Bl. 976, was overruled by *Rees v. Watts*, 11 Ex. 410; *ante*, 1876, note (q). In *Mardall v. Thelluson*, the defendants were sued as executors for a debt which accrued due from their testator in his lifetime, and it was held that they might set off a debt which had accrued due from the plaintiff to them as executors since the death of their testator.

(a) *Clements v. Reynolds, Sayer*, 18.

he must take care to plead *plene administravit*, or *plene administravit præter*, &c. For a judgment against an executor or administrator, whether by default (*a*¹) or on demurrer, (*b*) or upon verdict upon any plea pleaded by the executor or administrator, except *plene administravit*, or admitting assets to such a sum and *riens ultra*, (*c*) is conclusive upon him that he has assets to satisfy such judgment. (*d*) But if the executor plead either a general or special *plene administravit*, it is now held that he is liable only to the amount of assets proved to be in his hands; though the case was formerly taken to be, that if *any* assets, however small, were proved to be unadministered, the plaintiff was entitled to recover his whole demand from the executor. So that now a judgment against an executor, on a verdict upon *plene administravit*, is only an admission of assets to the extent of assets proved to be in his hands. (*e*)

The essential part of the plea of *plene administravit* is, that "the said defendant has no goods, which were of the said A. B. (the testator), at the time of his death in the hands of the said defendant, as executor, to be administered, or *had, at the time of the commencement of the suit, (f) or *ever since ;*" and the omis-

(*a*¹) [See *Mason v. Peter*, 1 Munf. 437; *Dickson v. Wilkinson*, 3 How. (U. S.) 57; *Baracliff v. Griscom*, 1 Coxé (N. J.), 165; *Mosier v. Zimmerman*, 5 Humph. 62. So of a judgment by confession. See *People v. Judges of Erie*, 4 Cowen, 445; *Powell v. Myers*, 1 Dev. & Bat. Eq. 502; *Freelands v. Royal*, 2 Hen. & Munf. 575; *Worsham v. McKenzie*, 1 Hen. & Munf. 342.]

(*b*) *Rock v. Leighton*, 1 Salk. 310; S. P. admitted 3 T. R. 686; *Leonard v. Simpson*, 2 Bing. N. C. 176; S. C. 2 Scott, 355.

(*c*) *Ramsden v. Jackson*, 1 Atk. 292; *Erving v. Peters*, 3 T. R. 685. A plea of *non est factum testatoris*, or of a release to the testator, or of payment by him, or *non assumpsit*, admits assets. 1 Saund. 335, note (10).

(*d*) 1 Saund. 219 *b*, note to *Wheatley v. Lane*; [Newcomb v. Goss, 1 Met. 333; *Platt v. Robins*, 1 John. Cas. 278; *Judge of Probate v. Lane*, 50 N. H. 556; *Huger v. Dawson*, 3 Rich. (S. Car.) 328; *Dorsey v. Hammond*, 1 Bland, 463; *Ellicott v.*

Welch, 2 Bland, 242; *Post v. Mackall*, 3 Bland, 486; *Lenoir v. Winn*, 4 Desana. 65. An executor sued in Tennessee on a judgment rendered against him in another state, if he did not plead fully administered in that suit, cannot have the benefit of such plea in Tennessee, but is liable to a judgment *de bonis propriis*. *White v. Archbill*, 2 Sneed, 588. In Illinois, the plea of *plene administravit* is no defence, neither is a judgment an admission of assets; it only establishes a debt against the intestate's estate, and no execution will issue thereon, but it will be paid when there are sufficient assets to pay it. *Judy v. Kelley*, 11 Ill. 211. See *Lee v. Gardner*, 26 Miss. 521.]

(*e*) 1 Saund. 219 *b*, note; *Cousins v. Paddon*, 2 Cr., M. & R. 558, per Parke B.; *Re Higgins's Trusts*, 2 Giff. 562. [See *Coleman v. Hall*, 12 Mass. 570.]

(*f*) See *Rees v. Morgan*, *post*, 1974, as to the effect of using the words "on the day of exhibiting the bill of the plaintiff."

sion of any of the above averments will be fatal on demurrer, as well in a general as a special *plene administravit*. (*f*¹) As where, in *assumpsit*, the defendant pleaded several outstanding bonds of the testator, "and that he had fully administered all the goods which were of the testator at the time of his death, or ever since, except goods and chattels to the value of 10*l.*, which are not sufficient to satisfy the debts due on the said bonds, and which are charged therewith;" on demurrer, the plea was adjudged bad by the whole court, for want of the intervening clause, "and that he has not any goods or chattels of the testator, or had on the day of the suing out of the writ, or ever since." For the *plene administravit*, as there pleaded, refers to the time of the plea pleaded, and the defendant may have paid debts on contract without suit after the writ purchased and before the plea, which he may give in evidence on the trial, if issue be joined on the *plene administravit* as there pleaded; and therefore the plaintiff has no other remedy but to demur. (*g*) So the omission of the words "or ever since," is held to be an incurable fault; for perhaps the executor had assets after the commencement of the action, with which he would be chargeable; and all the books and precedents direct that those words should be inserted in the pleas. (*h*) And the defect is not aided, unless it be found by verdict that he had no assets on the day of the *plea pleaded; for that aids the fault in the bar, and makes it not material; but it is not so upon demurrer. (*i*)

In this plea, it is usual to state that the defendant "has fully administered all the goods and chattels, &c. which were of the deceased at the time of his death, and which have ever come to the hands of the defendant as executor," &c.; but it is said that these words are superfluous, and that the more formal and correct way

(*f*¹) [2 Chitty Pl. (16th Am. ed.) 384, 385.]

(*g*) *Hewlet v. Framingham*, 3 Lev. 28. So the words, "on the day of exhibiting the bill," where the action was in the common pleas, or in the king's bench by original, instead of "on the day of suing out of the said writ," were adjudged to be a fatal defect. *Covel v. Deval*, 2 Lutw. 1637, 1638; 2 Saund. 216, note (1). See *Rees v. Morgan*, *post*, 1974.

(*h*) *Gewen v. Roll*, Cro. Jac. 132; 2

Saund. 216, note (1). But this has been denied in a modern case. See *Smith v. Tateham*, 2 Ex. 305, *post*, 1982. At all events, it is plain that if assets have come to hand since the suing out of the writ, the plaintiff must reply that fact specially, and will not be allowed to give it in evidence under the ordinary replication to *plene administravit*, viz, that the defendant had assets at the commencement of the suit. *Mara v. Quin*, 6 T. R. 10.

(*i*) Cro. Jac. 132.

of pleading is to omit them and to state merely that the defendant "has no goods or chattels." &c. (*j*)

But in an action brought against the executor of an executor it is not sufficient to plead that the defendant has not any goods or chattels of the original testator in his hands to be administered; but he must also plead, either that the first executor fully administered, or that he the said defendant has no assets of the first executor out of which he can satisfy any *debt* committed by the first executor. (*k*)

Again, an executor is *bound* to plead a debt of a higher nature, of which he has notice, in bar of an action brought against him for a debt of an inferior nature, and *riens ultra*, if he has not assets for both; otherwise it will be an admission of assets to satisfy both debts. (*l*) Thus the executor is bound to plead a judgment recovered against the testator, in bar of an action on a bond; otherwise he will admit that he has assets to satisfy the judgment. (*m*)

In strictness, it is proper, in this plea, to state some certain sum, or at least to say, to "the value of the debts aforesaid;" (*m*¹) for to plead generally "except goods and chattels which do *not amount to, or which are not sufficient to satisfy the debts aforesaid, or not *ultra* what will satisfy," or to the like effect, has been held to be insufficient for the uncertainty. (*n*) But the omission of stating a certain sum is mere form neither material nor traversable; (*o*) for if the executor plead a judgment obtained against him for 100*l.*, and that he has not goods except to the value of 5*l.*, and the plaintiff proves that he has 100*l.*, yet he gains nothing; for the

(*j*) 2 Saund. 220 *a*, note (3) to Noell v. Nelson. See Reeves v. Ward, 2 Bing. N. C. 235; S. C. 2 Scott, 396.

(*k*) Wells v. Fydell, 10 East, 315.

(*l*) Rock v. Leighton, 1 Salk. 310; *ante*, 1029; [Shaw v. M'Cameron, 11 Serg. & R. 252.] The law is the same, though the debt was not payable until after the death of the testator, as in the case of a bond conditioned to pay a sum of money on a day which did not happen until after his death. Britton v. Batthurst, 3 Lev. 114; Lemun v. Fooke, Ib. 57; *ante*, 1021.

(*m*) Earle v. Hinton, 2 Stra. 732.

(*m*¹) [2 Chitty Pl. (16th Am. ed.) 386.]

(*n*) Tresham's case, 9 Co. 109, 110;

Edgcomb v. Dee, Vaugh. 104; Davage v. Davage, 1 Sid. 210; 1 Saund. 333, note (7).

In an action against an administrator, the defendant, after obtaining time to plead on the usual terms, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets *ultra*. And the court of exchequer gave leave to the plaintiff to sign judgment as for want of a plea; the defendant having, since the commencement of the action, admitted by letter the possession of assets sufficient to cover the judgment, and also the plaintiff's demand.

Roberts v. Wood, 3 Dowl. 797.

(*o*) Parker v. Atfield, 1 Salk. 312.

substance of the plea is, that the executor has not *above* what will satisfy the judgment. And consequently, the omission is but form, and cannot be taken advantage of upon demurrer. (*p*)

In pleading an unsatisfied judgment recovered against the testator, the plea should state on what day and year of the reign, and in what court the judgment was recovered. (*q*) If the judgment pleaded was recovered against the testator and another, the plea must aver the survivorship of the testator. (*r*)

* In pleading a judgment against the executor himself, whether on bond or otherwise, it was formerly the practice to set out the debt, which is the consideration of the judgment, in the plea. But this statement is unnecessary. (*s*) Nor is it requisite to aver that the debt, for which the judgment has been obtained, was a true and just debt, although it is usual to make such an allegation; for if the debt was not a just one, the other side may show it in the replication. (*t*) The present form of pleading a judgment obtained against an executor, is to omit stating the nature of the debt, the suing out of the writ, and the plea; but instead thereof to allege that A. B. on such a day and year of the reign in the court, &c. impleaded the defendant as executor in a certain plea, &c. then declaring (so setting out the whole declaration); and such proceedings were thereupon had in the said court, and the said A. B. recovered judgment, &c. (*u*)

An averment that the judgment remains in force, though usually made, seems unnecessary; for the same reason as that mentioned above respecting the allegation, that the debt was not a true and

(*p*) *Moon v. Andrewes*, Hob. 133. If it should seem, pleadable by an executor. the truth be that the executor has not Williams *v. Fowler*, 1 Stra. 407, 410. sufficient to satisfy the debts of record (r) *Trethewy v. Ackland*, 2 Saund. 50; pleaded by him, he ought to state truly ante, 1013. what good she has, namely, to the value of (s) 1 Saund. 329, note (3). a certain sum which is not sufficient to satisfy these debts. 1 Saund. 333 a, note (7). (t) 1 Saund. 329, note (4); 2 Saund. 50, note (3).

(*q*) *Jordan v. Fawcett*, 1 Mod. 50; S. (u) 1 Saund. 330 a, note (5). The C. 1 Sid. 449; 1 Ventr. 76; 2 Keb. 632; Reg. Gen. H. T. 1853, r. 10, which requires that in a plea of judgment recovered the defendant shall state the number of the roll, &c. in the margin, does not apply to such a plea. *Power v. Fry*, 3 1 Saund. 328 a, note (1); [2 Chitty Pl. (16th Am. ed.) 386, 387.] Where an executor pleads a judgment not merely erroneous, but void as a recovery in an impossible term, the plea is bad; *Drake v. Randall*, 1 Freem. 225; but a judgment merely erroneous, if not fraudulent, is, as *Power v. Izod*, 1 Bing. N. C. 304; S. C. 1 Scott, 119. [See 2 Chitty Pl. (16th Am. ed.) 387, 388.]

just one. (x) But where the action is on a specialty, it is necessary to show, either that the judgment pleaded was recovered against the executor on a specialty, or that it was obtained before the executor had notice of the specialty debt on which the action was brought. (y)

A recovery against one of several executors or administrators, and no assets *ultra*, may be pleaded in an action * against all the executors or administrators for another debt of the testator or intestate. (z)

It may be observed, that a plea of judgment recovered against the executor himself, and no assets *ultra*, is a plea in bar of the action generally, and not with an *ulterius manutenerere non debet*, even where the judgment has been confessed after action brought, (a) and pleaded *puis darrein continuance*; contrary, apparently, to the general rule, that a matter of defence, arising after action brought, cannot be properly pleaded in bar of the action generally, but must be pleaded in bar of the further maintenance of the suit. (b) But this arises from the peculiar nature of the action, which is brought against the executor, not only on the foundation of a debt due from the testator to the plaintiff, but in respect also of assets, supposed to be in his, the executor's, hands, liable to its satisfaction; and the executor has by law a power of confessing a judgment to another creditor, in preference to the plaintiff, in the suit first brought, and thereby, to the extent of the assets then in hand, to create a perpetual bar to the plaintiff's suit, the same being pleaded in the usual way, viz, that he has not assets except so much, which are not sufficient to satisfy that judgment. But the plaintiff may, and constantly does, avoid the effect of the plea as an absolute bar, and protect himself from costs at the same time, on the ground of his original right of suit, by praying judgment of such assets as should come to the executor's hands, after satisfying the judgment so confessed. So that the plea of judgment recovered against the defendant as executor, pending the writ, inures in point of effect, if the judgment itself be not questioned

(x) 1 Saund. 329, note (4). It was once the practice to aver the identity of the defendant and the person named in the record; but this averment is now omitted. 1 Saund. 333 a, note (8).

(y) See *ante*, 1029.

(z) *Further v. Further*, Cro. Eliz. 471; S. C. *semble*, cited by Wyndham J. in *Palmer v. Lawson*, 1 Sid. 334.

(a) See *ante*, 1033, 1034.

(b) *Le Bret v. Papillon*, 4 East, 502.

by the replication, as only a plea in bar of the further maintenance of the suit against the executor in respect of his present assets. (c)

With respect to pleading bonds due from the testator, it * has been decided that, at law, the *penalties* are the debts as to those bonds where the days of payment are past, and the bonds of course forfeited. Therefore, an executor may either plead the penalty as the debt, or the sum really due. (d) But with regard to those bonds where the days of payment are not yet come, the sums in the conditions are the debts, and the assets can only be covered for them; (e) for the executor may save the penalty by payment of the less sums at the times specified in the conditions, and if he does not, it will be a *devastavit* in him, if he have assets. (f)

The nature and extent of the right of an executor or administrator to retain a debt due to him from the deceased, have been investigated in a previous part of this treatise. (g)

plea of re-
tainer:

It is held to be optional in the executor or administrator either to *plead* a retainer for such a debt, or to give it in *evidence* under a plea of *plene administravit*. (h) So he

for debt
due from
testator to
executor:

may either plead, or show in evidence under that plea, that he retains assets to a certain amount, for the expenses of the funeral, (i)

or of taking out administration, (k) or to reimburse himself for payments, made out of his own pocket, in discharge of debts not inferior in their kind to the debt of

for dis-
bursements
by execu-
tor:

the plaintiff, before the commencement of the suit. (l) But * a retainer for unsatisfied debts of the testator or intestate, of a higher degree than that on which the action is brought, must be pleaded. (m)

But * a
for debts
outstand-
ing:

(c) 4 East, 508.

(d) Bank of England v. Morice, 2 Stra. 1028; S. C. Cas. temp. Hardw. 219; Cox v. Joseph, 5 T. R. 307. So on an issue of what is due, such bonds will cover as much assets as the penalties amount to. Ib.; 1 Saund. 333 a, note (7).

(e) 2 Stra. 1028; Cas. temp. Hardw. 219; 5 T. R. 307.

(f) 1 Saund. 333 a, note (7). The court, however, always recommends that executors who plead judgments and other debts, with penalties, should show honestly how much is really due on them, and set out the conditions; which would save many suits in chancery; for if the penal-

ties only are pleaded, the creditor cannot learn the nature of the bond, but by filing a bill for a discovery. 5 T. R. 309; 1 Saund. 333 a, note (7).

(g) Ante, 1039 et seq. [See 2 Chitty Pl. (16th Am. ed.) 389.]

(h) 1 Saund. 333, note (6). See Jones v. Harry, 4 Price, 89, as to the form of pleading a retainer for a specialty debt.

(i) See R. v. Wade, 5 Price, 621, as to the form of such a plea.

(k) Gillies v. Smither, 2 Stark. N. P. C. 528.

(l) Co. Lit. 283 a; Bull. N. P. 140.

(m) Ante, 1029, 1030; Bull. N. P. 141.

In a plea of retainer by an *administrator*, he need not set out the letters of administration; for the plaintiff by his declaration admits him to be a lawful administrator; since he sues him as administrator, which he cannot be in his own wrong. (*n*) But where the action is brought against the defendant as executor, which is the case as well where the defendant is charged as rightful executor, as where he is charged as executor *de son tort* who has no right to retain, (*o*) it seems that, regularly, he ought to entitle himself as executor in his plea, by stating the making of the will and his appointment as executor therein, in order that it may appear that he is such a person as may retain. (*p*) So where the action was brought against the defendant, as executor, and he claimed to retain as *administrator*, it was held that it was necessary for him to show the letters of administration in his plea. (*q*)

Where an executor pleads that he has no assets *ultra* a judgment, which, in truth, was recovered against him upon an unjust or fictitious debt, the plaintiff may reply, that the judgment was had and obtained by fraud and covin between the executor and the creditor. (*r*) But the plaintiff cannot traverse the averment that the debt, for which the judgment was had, was a just and true debt. (*s*)

So the plaintiff may reply that the judgment is kept on *foot by covin to defraud the creditors, viz, "that the said defendant defers procuring acknowledgment of satisfaction to be entered of the said debt and damages, so recovered, &c. with intent to defraud him the said plaintiff." As where the executor compounds for a less sum and does not procure the judgment to be discharged, but pleads it to an action brought against him by another creditor, he may reply the composition, and that the judgment is kept on

(*n*) *Picard v. Brown*, 6 T. R. 550; *ante*, 266, note (*y*).

(*o*) See *ante*, 269, 270.

(*p*) *Prince v. Rowson*, 1 Mod. 208; 2 Mod. 51. [Where one sued as executor relies upon a retainer, he must produce the letters testamentary and show that he is rightful executor. *Partee v. Caughran*, 9 Yerger, 460.]

(*q*) *Caverley v. Ellison*, T. Jones, 23; [2 Chitty Pl. (16th Am. ed.) 389.]

(*r*) *Williams v. Fowler*, 1 Stra. 410; 2 Saund. 50, note (3).

(*s*) *Robinson v. Corbett*, 1 Lutw. 662, by Powell J.; 2 Saund. 50, note (3). Indeed, it is not necessary for an executor who pleads an outstanding judgment, to aver that the debt, upon which the judgment was obtained, was a just and true debt. *Ante*, 1957. See, however, *Green v. Wilcocks*, Cro. Eliz. 462; *Trethewy v. Ackland*, 2 Saund. 48 a; Com. Dig. Pleader, 2 D. 9.

foot by covin; for nothing shall be allowed to the executor but what he actually pays. (*t*)

The executor, in his rejoinder to replications of this description, is bound to traverse the fraud. (*u*) And the plaintiff may, upon this issue, give in evidence, either that the debt is not a just one, or that less is due than the sum for which judgment has been given. (*x*)

In answer to the latter evidence, which is *primâ facie* proof of fraud, the defendant may show that the judgment was entered for more than was due, by mistake. (*y*) If a judgment is pleaded, and *per fraudem* replied, upon which issue is taken, and it appears in evidence that the creditor was willing to take less than is recovered, it is proof of fraud; but if it be shown that the administrator had not assets to pay that sum, it is no fraud. (*z*) It should be observed, that where a judgment is obtained against an executor by covin, but for a just debt, the creditor cannot * avoid the judgment by alleging that it was obtained by covin to defraud him. (*a*)

When the judgments or debts pleaded by the executor are upon *penalties*, it seems the right of way of replying is, to say that the creditor would have accepted the less sums, but the defendant either would not pay or had paid them, but *kept the judgments or bonds on foot by fraud and covin*. And the plaintiff, on issue joined thereon, may give in evidence such matter as will serve to avoid the penalties. For if he replies generally that the judgments were for less sums, and the defendant has assets above what will satisfy them, on the issue that he has not, the defendant has a right to insist on the *penalties* as the debts. (*b*)

(*t*) 1 Saund. 334, note (9); *ante*, 1841, 1843.

(*u*) *Veale v. Gatesdon*, W. Jones, 92; *Parker v. Atfield*, 1 Ld. Raym. 678; 1 Saund. 324, note (9); 2 Saund. 50, note (3). The other averments in the replication, such as the allegation of the payment of the money in satisfaction of the judgment, are only inducement and not traversable. *Veale v. Gatesdon*, W. Jones, 92, 5th Resolution; *Beaumont's case*, Latch, 111; 1 Saund. 334, note (9); *Jones v. Roberts*, 2 Cr. & M. 219; S. C. 4 Tyrwh. 48. But the executor is at liberty, where several judgments have been

pleaded by, him either to traverse that each particular judgment was kept up by fraud, or to include all the judgments pleaded in one general traverse. *Beake v. Kent*, Carth. 195; S. C. 4 Mod. 64; 1 Saund. 334, note (9).

(*x*) 2 Saund. 50, note (3).

(*y*) *Pease v. Naylor*, 5 T. R. 80.

(*z*) *Per curiam*, in *Parker v. Atfield*, 1 Salk. 312.

(*a*) *Veale v. Gatesdon*, W. Jones, 92, 3d Resolution; *Williams v. Fowler*, 1 Stra. 410; 1 Saund. 334, note (9). See *ante*, 1033, 1034.

(*b*) *Thompson v. Hunt*, 3 Lev. 368;

With respect to the question whether the plaintiff, by avoiding any one of the judgments stated in the plea, will be entitled to recover judgment in the action, it must be observed, that if an executor pleads several judgments recovered *against himself*, and one of them is ill pleaded, or upon issue joined is found against the executor, the plaintiff is entitled to judgment; and the reason is, that if one or *twenty judgments be recovered against an executor himself, whether by default, or by verdict finding them on *plene administravit*, it is an admission of assets to satisfy them all. (c) And, therefore, as the judgments pleaded admit assets so far, if any one of them be falsified, the executor does of course admit by his plea that he has more assets than will satisfy the other judgments, by as much as the judgment so falsified amounts to. (d) And in such case the plaintiff will be equally entitled, though the plea alleges that the defendant has but a small sum not sufficient to satisfy all the judgments; for the allegation is not material. (e)

But the reason above stated does not apply to a plea in which the executor pleads several outstanding judgments obtained *against his testator*; for a judgment obtained against the testator is no admission of assets by the executor; and, therefore, there seems no ground upon which an executor ought to be subjected to a general judgment for the whole, because one of the judgments averred to have been recovered against the testator is ill pleaded, or found

Bell v. Bolton, 1 Lutw. 450; 1 Saund. 334, note (9). If the defendant pleads several outstanding debts on judgments and bonds, and that he has no assets beyond what will satisfy those debts, the plaintiff is allowed to reply to every judgment or other debt or payment pleaded, or some or one of them, omitting the rest, without being considered guilty of duplicity in pleading. 1 Saund. 337 b, note (2). This is an anomalous case, for according to the general rules of pleading, the replication would be considered double, and so open to special demurrer (now abolished by the C. L. P. Act), if it be true that by avoiding *any one* of the judgments in the plea, the plaintiff will be entitled to recover judgment *de bonis testatoris*, and by replying to each he tenders several issues, where one is sufficient to defeat the

defendant's plea. Turner's case, 8 Co. 132; Trethewy v. Ackland, 2 Saund. 49, 50; Jefferies v. Dee, 1 Lev. 281; Ashton v. Sherman, 1 Ld. Raym. 263; S. C. 1 Salk. 298; Carth. 431; 1 Saund. 337 b, note (2). But the better way is to answer only such judgment as the plaintiff knows to have been obtained by fraud. 2 Saund. 337 b, note (2).

(c) Rock v. Leighton, 1 Salk. 310.

(d) 1 Saund. 337, note (1). According to the case of Harrison v. Beccles, cited in Irving v. Peters, 3 T. R. 688, judgment shall not be entered up for the whole debt, but only for the sum to which the assets thus admitted shall amount. See *infra*, 1976, 1977, and 1 Saund. 336, note to Hancock v. Prowd.

(e) Parker v. Atfield, 1 Salk. 312.

to be false. Where, indeed, the executor pleads several judgments, and that he *has only assets sufficient to satisfy them*, if the plaintiff can falsify any one of the judgments, as by showing it satisfied, or the like, he will be entitled to judgment; for the plea was false, and the falsehood detrimental to the plaintiff, and beneficial to the defendant. For as one of the judgments was falsified, the executor has confessed that he has more assets than will satisfy other judgments, by as much as the judgment so satisfied amounts to. (f) But the cases have gone farther than this; for there *are several authorities to show that where the executor pleads several judgments recovered against the testator, and *avers that he has assets to a small amount named in the plea*, yet the rule is, that if the plea be false or bad in part, it shall be wholly set aside. (g) Thus, in *Norton v. Harvey*, (h) which was adjudged in K. B. and affirmed in the exchequer chamber, where the defendant pleaded several judgments obtained against the testator, and among others a judgment against the testator and one A. B., but did not aver that A. B. died before the testator, so that it did not appear that the defendant was liable to that judgment; *although he averred that he had assets to a small sum*, yet for this defect the plea was adjudged insufficient and bad in the whole, and judgment given against the defendant *de bonis testatoris* generally, and all the judgments which were well pleaded set aside. (i)

Yet, notwithstanding these cases, it seems to be contrary to common sense and justice that there should be a judgment against an executor who has no assets to satisfy the debt in demand, merely because his plea is mispleaded, or one of the judgments is false. (k)

(f) 1 Saund. 337, note (1). So in *Campion v. Bentley*, 1 Esp. 344, an administrator pleaded a retainer for a debt due to himself, and a judgment obtained by another creditor, and *nil assets ultra*. The replication denied that the sum sought to be retained was justly due, and, as to the judgment, alleged that it was obtained and kept on foot by fraud. Upon issue joined on these two points, Eyre C. J. told the jury that they were to inquire whether the defendant had pleaded a false plea or not, and if they believed either of the demands set up against the

intestate's estate to be unfounded, they ought to find a verdict for the plaintiff.

(g) *Trethewy v. Ackland*, 2 Saund. 48.

(h) Cited in 2 Saund. 50.

(i) See, also, *S. P. Parker v. Atfield*, 1 Salk. 312; *S. C.* 1 *Ld. Raym.* 678; *R. v. Dickinson*, *Parker's Rep.* 263; 1 Saund. 337, note (1).

(k) 1 Saund. 337, note (1). It is certain that the executor must ultimately pay out of his own pocket the debt and costs so recovered; for he may be compelled so to do by *scire fieri* on the judgment, or action

Accordingly, Lord Vaughan, in his judgment in *Edgcombe v. Dee*, (l) finds fault with this * rule, and says, that the entirety of the plea, which is the only foundation of it, is a *spungy* reason, and not sense; for if the falsehood or badness of the plea be neither hurtful to the plaintiff nor beneficial to the defendant, why should the plaintiff *have* what he ought not, or the defendant *pay* what he ought not? (m) Besides, the usual pleading is, that the plaintiff must avoid all payments pleaded in bar, until some assets appear remaining in the executor's hands, and then the plaintiff is to have judgment. (n)

Perhaps, therefore, the rule may be understood thus: that if the executor pleads judgments obtained against *his testator*, and that he has not sufficient to satisfy them, or any of them, if any one or more of the judgments be avoided, still there ought not to be a general judgment against the executor, or at least, not until so many are avoided as to leave assets in the executor's hands. But if he pleads judgments obtained *against himself*, and any more of them be avoided, in that case there ought to be a general judgment for the plaintiff. (o)

If an executor or administrator pleads *plene administravit*, and the plaintiff replies that the defendant had assets at the commencement of the suit, whereupon issue is joined, the burden of proof lies upon the plaintiff, who must prove that assets existed, or ought to have existed, in the hands of the defendant at the time of the writ sued out. (p) The question, as to what shall be considered assets come to the hands of the executor or administrator, has been already discussed. (q)

of debt suggesting a *devastavit*. See *infra*, 1984 *et seq.*

(l) *Vaugh.* 104, 105.

(m) 1 *Saund.* 337, note (1).

(n) *Vaugh.* 105; 1 *Saund.* 337, note (1).

(o) 1 *Saund.* 337 *a*, note (1). See *Cousins v. Paddon*, 2 Cr., M. & R. 558, per Parke B. acc.

(p) *Mara v. Quin*, 6 T. R. 10; *Webster v. Blackman*, 2 Fost. & F. 490; [*Marquis v. Rogers*, 8 Blackf. 118; *Wallace v. Barlow*, 3 Bibb (Ky.), 169; *Bentley v. Bentley*, 7 Cowen, 701; *Ely v. Horine*, 5 Dana, 398; *Shannon v. Dinkins*, 2 Strobb. 196.]

(q) *Ante*, 1667 *et seq.* In *Britton v. Jones*, 3 Bing. N. C. 676, upon a plea of *plene administravit* and replication of assets in hand at the time of the commencement of the suit, it appeared at the trial that the testator, twelve months before his decease, purchased twelve mahogany chairs, which were seen in the house where he lived shortly before his death. The defendant proved that the deceased died poor, that he lodged in the same house with his mother and his sister, the defendant; and that money was borrowed to bury him. It was contended that, as it

* The plaintiff cannot prove, under this issue, that assets have been received subsequently to the commencement of the suit; to be admitted to such proof, he should have replied this matter specially. (*r*)

If, upon the issue of *plene administravit*, it shall appear that the executor or administrator has been guilty of a *devastavit*, which has caused a failure of assets, the jury must find that the defendant has assets to that amount, and not find a *devastavit*. (*s*)

In order to prove assets, the plaintiff may give in evidence the inventory exhibited by the defendant in the court of probate. (*s*¹) And after the inventory is put in, it is for the defendant to discharge himself of the items. (*t*)

had not been proved that the furniture in question ever came to the hands of the defendant, there was no evidence to charge her with it as assets; but the court of C. P. held that there was a *primâ facie* case for that purpose. See, also, *Stroud v. Dandridge*, 1 Car. & K. 445.

(*r*) *Mara v. Quinn*, 6 T. R. 11; 2 Phill. Ev. 347, 6th ed.; *Roscoe Ev.* 59, 4th ed. But it has been lately denied that such a replication is allowable. See *ante*, 1954, note (*h*); *post*, 1982, note (*a*).

(*s*) *Wentw. Off. Ex. c.* 13, p. 312, 14th ed. This finding by the jury of assets in the hands of the executor is not against truth, though they be wasted, and so not to be had in kind; for the executor had them in right, since he has not rightfully parted from them according to the rule, *pro possessore habetur qui dolo aut injuriâ desit possidere*. *Ib.* See *Reeves v. Ward*, 2 Bing. N. C. 235; S. C. 2 Scott, 296.

(*s*¹) [In an action against an administrator, upon an issue of fully administered, the plaintiff may prove assets not included in the inventory, or, where there is no inventory returned, may show assets in the hands of the administrator. *Marr v. Rucker*, 1 Humph. 348.]

(*t*) *Giles v. Dyson*, 1 Stark. N. P. C. 32. [See *Hoover v. Miller*, 6 Jones (Law), 79; *Cameron v. Cameron*, 15 Wis. 1; *Brigg's Appeal*, Brayt. (Vt.) 149. In a state where it was the duty of the administrator to inventory real estate, his inven-

tory, when returned and filed, is to be considered *primâ facie* as embracing all the land belonging to the deceased. *Reed v. Gilbert*, 32 Maine, 519; *Morrill v. Foster*, 33 N. H. 379. But this is a mere presumption, and an omission to include all the property of the deceased may be accounted for where the circumstances are sufficient. *Walker v. Walker*, 25 Geo. 76; *McWillie v. Van Vacter*, 35 Miss. 428. The inventory is not conclusive either for or against the executor or administrator or his sureties, but is open to denial or explanation. *Nabb v. Nixon*, 7 Nev. 163.] It is said in *Bull. N. P.* 140, that the plaintiff cannot give in evidence a copy of an inventory delivered by the defendant to the spiritual court, unless it be signed by him, though it be signed by the appraisers. But it should seem that any clear recognition of the instrument as an inventory would be tantamount in effect to signature. [*Carrol v. Connet*, 2 J. J. Marsh. 195. See *Parks v. Rucker*, 5 Leigh, 149; *Carr v. Anderson*, 2 Hen. & Munf. 361. The inventory is *primâ facie* evidence of the value of the property, as well as of what assets have come into the hands of the executor or administrator, and if he has disposed of any of the property, he is *primâ facie* liable for the amount of money at which it was inventoried. But the valuation of the estate, as made by the appraisers, is not conclusive against the executor or administra-

In Shelly's case, (u) Lord Holt said, that all sperate debts mentioned in the inventory shall be accounted assets in the executor's hands; for that is as much as to say that they may be had for demanding, unless the demand or refusal be proved. (u¹) Again, in Smith v. Davies, (x) Lord Hardwicke held, *that if in the inventory produced the article concerning debts does not distinguish between sperate and desperate, it will be sufficient to charge the executor with the whole *primâ facie* as assets, and put upon him to prove any of them desperate, (x¹) as if the article were, "Item, for debts due and owing, which I admit myself to be charged with when recovered or received." (y) And the authority of these cases appears to have been recognized and acted

tor; he may prove it too high. Ames v. Downing, 1 Bradf. Sur. 321. See Montgomery v. Dunning, 2 Bradf. Sur. 220. So on the other hand, if it is shown that the property inventoried has been disposed of for more than the inventory price, the executor or administrator is liable for the amount it was sold for. Willoughby v. McCluer, 2 Wend. 608. And where assets are taken by the executor or administrator at the value as appraised in the inventory, if it is shown that they are of greater value than that price, he must answer for the true value. Zilkin v. Carhart, 3 Bradf. Sur. 376. It is provided by statute in Massachusetts that executors and administrators shall make no profit by the increase and sustain no loss by the decrease or destruction without their fault, of any part of the estate. If they sell any part of the personal estate for more than the appraised value, they shall account for the excess; and if they sell any for less than the appraised value, they shall be allowed for the loss, if it appears to the probate court that the sale was expedient and for the interest of all concerned in the estate. Genl. Sts. c. 98, § 2. And they are chargeable with all interest, profit, and income that come to their hands from the personal estate of the deceased. Genl. Sts. Mass. c. 98, § 7; ante, 974, note (a¹), 1841, and note (k).]

(u) 1 Salk. 296.

(u¹) [But where an administrator in-

ventories a debt as desperate, he will not be charged with it except upon proof that he has, or might have, collected it. Finch v. Ragland, 2 Dev. Eq. 137; ante, 981, note (o). And by statute, in Massachusetts, in no case will an executor or administrator be charged with debts inventoried as due to the deceased, if it appears to the probate court that they remain uncollected without his fault. Genl. Sts. Mass. c. 98, § 6.]

(x) Bull. N. P. 140; S. C. Selwyn's N. P. 779, note, 6th ed.

(x¹) [A debt returned in the inventory of an executor or administrator without comment, will be presumed to have been collected in full, unless the contrary is proved. Graham v. Davidson, 2 Dev. & Bat. Eq. 155; Hickman v. Kamp, 3 Bush (Ky.), 205; ante, 1966, note (u¹). And where the debt is returned "desperate," it is not necessary for a creditor suing such executor or administrator to show that the debt was due to the testator; it is sufficient for him to prove that the debtor was solvent, in order to throw upon the executor or administrator the burden of showing that the debts could not be collected. Huntingdon v. Spears, 3 Ired. (Law) 450.]

(y) The defendant proved, by a witness, who went to demand several of them, that he could not recover them, and accordingly they were allowed as desperate. Selw. *ubi supra*.

upon in the common pleas, in a case in the time of Dallas C. J. (z) But in *Gyles v. Dyson*, (a) where on the trial of an issue joined on a plea of *plene administravit*, it was contended, on the authority of *Smith v. Davies*, that certain debts which the defendant had, in an inventory exhibited in the ecclesiastical court, allowed to be due to the estate and which he did not represent to be desperate, were to be considered as actual assets in his hands, Lord Ellenborough said, "You must prove, presumptively at least, that these debts have been paid; that presumption may depend on the time and a number of other circumstances; but upon the plea of *plene administravit* it is necessary to prove that effects came into the hands of the defendant; this is the universal practice." (b)

With reference to the effect of an inventory, as an admission of assets, there seems to be a material difference between the inventory, which according to the old practice of the prerogative court of Canterbury, and the continued practice of some country jurisdictions, is exhibited *before probate*, (c) and the deliberate inventory which is exhibited by an executor or administrator on the citation of a party interested in the estate, (d) or spontaneously before a final settlement. (e) * In *Stearn v. Mills*, (f) which was an action of debt against executors on a testator's bond, the defendant Mills pleaded *plene administravit*, and there was judgment by default against the defendant Mrs. Wright. At the trial at the Suffolk Lent Assizes, 1832, it appeared that the testator died in 1816, and that the will was proved by both defendants, *on which occasion* an inventory of the effects was exhibited in the ecclesiastical court. Mrs. Wright produced it, but Mills was present and acquiesced, though without saying anything, and neither signed it. The inventory comprised only the stock upon the farm occupied by the testator at the time of his death, amounting in value to 1,105*l.*; there were other effects, and likewise debts and moneys of the testator, which were not included. No other inventory appeared ever to have been exhibited. Mrs. Wright continued in the occupation and management of the farm (according to the desire of the testator) till 1830. Mills knew of her doing so, and was himself occasionally at the farm; but it was not shown that any of the

(z) *Young v. Cawdrey*, 8 Taunt. 734; S. C. *nomine Young v. Cordery*, 3 B. Moore, 69.

(a) 1 Stark. N. P. C. 32.

(b) See *ante*, 1669, 1670.

(c) See *ante*, 974.

(d) See *ante*, 975 *et seq.*; *post*, ch. III.

(e) See *ante*, 975, note (d).

(f) 4 B. & Ad. 657; S. C. 1 Nev. & M. 434.

effects actually came into his hands. Upon these facts, the court of king's bench was of opinion that there was no proof of assets received as against Mills, and that he was entitled to a verdict. And Lord Denman C. J. in giving judgment said, "I am of opinion that the inventory, *delivered by an executor on proving the will*, is not, in itself, evidence of assets having come to his hands; and the fact, in this case, of Mills having occasionally gone to the farm, is not sufficient to affect him with liability as an executor having had possession of the property." Littledale J. said, "It is not necessary here to consider whether an inventory, in some cases, may or may not be evidence of assets received; it was not so under the circumstances of this case. It was, indeed, stated here, that nothing came to the hands of Mills; but I do not agree in the general proposition, that an executor, who has exhibited an inventory, is bound to show that he *received no assets; because, even if that did not appear, I think an inventory, exhibited as this was, would be no evidence against him. An executor is not obliged, before proving the will, to go into any distant country, where effects of the testator may be, to ascertain their real value; it is sufficient if he receives such information as he is able to obtain, and then exhibits an inventory to show as far as possible the amount of the property to be administered; one object of which is, to ascertain the fees to be taken on the probate, pursuant to the statute 21 Hen. 8, c. 5. There may be goods in the hands of a factor, who may prove insolvent; it cannot be said that an executor, by including them in the inventory, charges himself with them as assets." Parke J.: "Assuming that the inventory here was exhibited by both defendants, of which I have some doubt, it could be only *prima facie* evidence. (*f*¹) I will not say whether such an inventory as this would not be *prima facie* evidence, since it related wholly to effects which were upon the farm, and did not include any debts. But if so, the evidence was clearly rebutted, by proof that *Mills* never did, in fact, take possession. To say generally that the mere circumstance of having joined in an inventory for the purpose of obtaining probate renders an executor liable, would be going farther than is warranted by any authority." (*f*²)

(*f*¹) [See *Carr v. Anderson*, 2 Hen. & Munf. 361; *Rogers v. Chandler*, 3 Munf. 65.]

(*f*²) [See *Serret v. Labaune*, 15 La. Ann. 186. And on the other hand, an executor or administrator is not to be charged with

The amount of the probate stamp is *admissible* in evidence, on the issue joined on a plea of *plene administravit*. (g) And the court of king's bench, in *Foster v. Blakelock*, (h) held that the probate stamp was *prima facie* evidence that the executor had assets to the amount covered by the stamp. (i) But this decision, it should seem, must now be considered as overruled. In the above mentioned case of *Stearn v. Mills*, Littledale J. and Parke J. expressed their dissent *from it. And in the subsequent case of *Mann v. Lang*, (k) Littledale J. said that he could not say that the stamp on the probate was not admissible; but it was not *prima facie* evidence of the amount of assets. In the same case Lord Denman expressed his opinion, that if there be evidence of a long acquiescence by the executor, without re-demanding any of the duty, it is *prima facie* evidence of such amount; though it is not of itself evidence of such amount. But Patterson J. was of opinion that it is not such *prima facie* evidence, even if a long acquiescence is shown. This subject has lately been again considered in the court of chancery, in the case of *Lazonby v. Rawson*, (l) where Lord Cranworth C. in giving judgment, said, "The circumstance of an executor having paid probate duty up to a particular amount, may be *prima facie* evidence of his having thought that the testator had died possessed of property represented by the amount of the stamp duty paid. But the probate duty is, in the first instance, payable on the whole of the personal estate left by the testator. If it cannot all be got in, and it should be ascertained that it was not of the value represented, in such a case provision is made for enabling the executor to get a return of the amount overpaid. Where, therefore, an executor has not made any application for the return of the duty which he may have paid in excess, it is a step in evidence towards proving an admission of assets to the amount, though by no means conclusive evidence that the executor had made a correct estimate of the testator's property. Much might depend on the amount overpaid, and the pecuniary condition in life of the executor, whether he would

debts due the estate, which he has not received or lost by neglect, merely because of an omission to insert them in the inventory. *McCall v. Peachy*, 3 Munf. 288; *Connelly's Appeal*, 1 Grant (Penn.), 366.]

(g) *Mann v. Lang*, 3 Ad. & El. 699; S. C. 5 Nev. & M. 202.

(h) 5 B. & C. 328; S. C. 6 D. & R. 46.

(i) See, also, *Curtis v. Hunt*, 1 C. & P. 180, where Lord Tenterden ruled to the same effect.

(k) 3 Ad. & El. 699; 5 Nev. & M. 20.

(l) 4 De G., M. & G. 556; 2 Sm. & G. 267.

be at the trouble of getting a return of the excess of duty overpaid. Here the executor paid 40*l.* in respect of probate duty, and never got back any of it, and I think it certainly amounts to strong presumptive evidence that he had received assets to the extent covered by that *amount of duty ; but it is not an absolute admission that he did."

An admission by the defendant, that a debt is a just debt, or a promise to pay it as soon as he can, is not evidence to charge him with assets; for such an admission must be understood with a reasonable intendment, and the executor could not mean to pledge himself to commit a *devastavit*, by paying this debt before others of a higher nature. (*m*) But if an executor compound with the creditors, and afterwards at the suit of any of them plead *plene administravit*, proof of the composition would be conclusive proof of assets, and the court would not suffer him to give evidence of no assets. (*n*) However, an executor will not admit assets by paying interest on a bond due from the testator ; (*o*) for it would be unreasonable that he should be liable for the whole debt, by paying a part out of his own funds, or that, because he has enough in his hands to pay the interest, he should be thereby concluded from disputing assets for the principal. (*p*)

In addition to the proof of assets, it will be necessary for the plaintiff, in an action of *assumpsit*, to prove the amount of the debt, otherwise he shall recover but 1*l.* damages ; for the plea only admits a debt, but not the amount. (*q*) But the rule is different in an action of debt, where a specific debt is demanded ; as, in an action of debt, if the defendant plead *plene administravit*, without pleading also *nunquam indebitatus*, there the debt is admitted by the plea and need not be proved. (*r*)

* In answer to the proof of assets, the executor or administrator evidence may show under the issue joined on *plene administra-*
for execu- *vit*, (*s*) that he has exhausted the assets, by discharging
tor that

(*m*) *Hindsley v. Russell*, 12 East, 232 ; 2 Phill. Ev. 348, 6th ed. If the executor refers a party to a third person for information respecting the effects of the testator, it should seem that an admission of assets by such third person will bind the executor. *Williams v. Innes*, 1 Camp. 364.

(*n*) Bull. N. P. 145.

(*o*) *Cleverley v. Brett*, cited by Buller J. 5 T. R. 8 ; 2 Phill. Ev. 348, 6th ed.

(*p*) See, further, as to what is an admission of assets, *post*, ch. 11.

(*q*) *Shelly's case*, 1 Salk. 296.

(*r*) 2 Phill. Ev. 348, 6th ed. ; *Saunderson v. Nicholle*, 1 Show. 81 ; Bull. N. P. 140.

(*s*) Or on a plea of want of assets, without any averment of *plene administravit*. *Reeves v. Ward*, 2 Bing. N. C. 235 ; S. C. 2 Scott, 396 ; *ante*, 1955.

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other demands on the estate, not inferior in their nature to that of the plaintiff, (*t*) or even by the payment of debts of inferior degree, without notice of the plaintiff's demand. (*u*) Again, the executor may show that he has disbursed the assets in the expenses of the funeral, or of probate, (*x*) or administration, or, as it should seem, in the reasonable charges of collecting the debts of the deceased. (*y*) So he may show that he has retained money in his hands to pay for the expenses of administration, to which he has made himself liable, without proving that he has paid them. (*z*)

Where the executor shows payments made by him to the extent of the assets proved by the plaintiff to have come to his hands, the plaintiff may show, in answer, that the funds so applied did not come to the defendant as executor, but were handed to him in trust to pay the testator's debts, and were not part of the assets first proved to have come to his hands. (*a*)

The defendant cannot, under a plea of *plene administravit*, *give evidence of the existence of outstanding debts of a higher nature; such defence must be pleaded. (*b*)

(*t*) See *ante*, 1032 *et seq.*

(*u*) *Chelsea Water Works Company v. Cowper*, 1 Esp. N. P. C. 277; *ante*, 1028. But according to the judgment of Lawrence J. in *Hickey v. Hayter*, 6 T. R. 388, these payments without notice must be pleaded.

(*x*) It is a question for the jury whether the executor has committed a *devastavit* by swearing the property above its value without reasonable ground, and so incurring a greater stamp duty than was requisite, seeing that the executor is bound to act promptly, and therefore is not to be held to too close a search for the testator's property. *Jackson v. Bowley*, C. & M. 97.

(*y*) *Giles v. Dyson*, 1 Stark. N. P. C. 32. But he cannot be allowed for disbursements in the schooling, feeding, and clothing of the children of the testator, subsequently to his decease. *Ib.*

(*z*) See *ante*, 1960; *Gillies v. Smither*, 2 Stark. N. P. C. 528. [By statute of Massachusetts, if it appears after the settlement of the administration accounts in the probate court that the whole estate

and effects which have come to the hands of the executor or administrator have been exhausted in paying the charges of administration, the allowance to the widow or minor children of the deceased, and the charges of his last sickness and funeral, or any other debts or claims entitled by law to a preference over the common creditors of the deceased, such settlement shall be a sufficient bar to any action brought against the executor or administrator by a creditor who is not entitled to such preference, although the estate has not been represented insolvent. Genl. Sts. Mass. c. 97, § 20. See *Hildreth v. Marshall*, 7 Gray, 167. The administrator of an insolvent estate can defend a suit brought against him for a debt due from his intestate, only by showing an account of administration, settled in the probate court, or by regular proceedings in insolvency. *Cushing v. Field*, 9 Met. 180. See *Stuckey v. Bellah*, 41 Ala. 700.]

(*a*) *Marston v. Downes*, 1 Ad. & El. 31; 6 C. & P. 381.

(*b*) *Bull. N. P.* 141; 1 Saund. 333 a,

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Again, the defendant cannot show, in answer to proof of assets, that he has applied them in the payment of debts since the commencement of the suit; for under *plene administravit*, no payments, made after the action commenced, can be given in evidence. (c) If, therefore, the executor has paid other creditors of superior degree after action commenced, he must plead that matter specially, and if he has paid other creditors of equal degree, since the writ issued, without having had notice of the suit, he ought to plead specially *plene administravit* before notice. (d)

In *Rees v. Morgan*, (e) after the passing of the act for the uniformity of process, 2 W. 4, c. 39, which directs that all personal actions shall be commenced by writ of summons, an executrix pleaded, to an action of assumpsit, *plene administravit*, and no assets *on the day of exhibiting the bill* of the plaintiff. The plaintiff in his replication tendered issue in the words of the plea. And the court of king's bench held, that the words *exhibiting the bill*, upon these pleadings, meant the commencement of the suit by writ of summons, and not the filing of the declaration; and therefore that evidence of payments made by the executrix between the times of suing out the writ and filing the declaration, was inadmissible.

It should seem (as there has already been occasion to point out), (f) that if, in the distribution of assets, a creditor misleads an executor, either by laches or express * authority, so as thereby to induce him to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets. (g) So where a party entitled to a legacy under a will has a claim against the testator, which he conceals from the executors till after he has received his legacy, he cannot afterwards, in an action against the executors, object that the amount of the legacy was not paid in a due course of administration. (h)

Judgment
against an
executor:

Whenever the action against an executor or administrator can only be supported against him in that charac-

note (8); *ante*, 1028, 1029. It is said in 2 Phill. Ev. 350, 6th ed., that the defendant may prove under *plene administravit*, subsisting judgment debts, and retain assets to the full amount; but this seems not to be correct; and the authority cited, *Bond v. Green*, 1 Brownl. 75, it should appear, applies merely to a retainer of a debt due to the defendant himself.

(c) *Dyer*, 32 a, in *margin*; *Com. Dig. Admon. C. 2*; *Nightingale v. Lee*, 1 Freem. 110.

(d) *Ante*, 1033, note (o).

(e) 5 B. & Ad. 1034.

(f) *Ante*, 1352 *et seq.*

(g) *Richards v. Browne*, 3 Bing. N. C. 499, by Tindal C. J.; *ante*, 1354.

(h) *Stroud v. Stroud*, 7 M. & Gr. 417.

ter, and he pleads any plea which admits that he has acted as such, (except a release to himself) the judgment against him must be, that the plaintiff do recover the debt and costs to be levied *out of the assets of the testator*, if the defendant have so much, (*h*¹) but if not, then *the costs* out of the defendant's *own goods*; otherwise, the judgment will be erroneous. (*i*) As where the defendant pleads *non est factum testatoris*, or a release *to the testator*, or payment by him, or *non assumpsit*; though these pleas admit assets. (*k*) So where the executor *pleads *plene administravit*,

(*h*¹) [See *Greenwood v. Spiller*, 2 Scammon, 502; *Burnap v. Dennis*, 3 Scammon, 478; *M'Dowell v. Wright*, 4 Scammon, 403; *Massingale v. Jones*, 3 Hayw. 36; *Hapgood v. Houghton*, 10 Pick. 154; *Gray C. J. in National Bank of Troy v. Stanton*, 116 Mass. 438; *Justices v. Sloan*, 7 Geo. 31; *Scott v. Mitchell*, 1 Missou. 764; *Campfield v. Ely*, 13 N. J. (Law) 150; *Barrow v. Wade*, 7 Sm. & M. 49; *Quicksall v. Quicksall*, 2 Penning. (N. J.) 457; *Murray v. Davis*, 2 Penning. (N. J.) 843; *Flagg v. Winans*, 2 Ind. 123; *Voorhies v. Eubank*, 6 Iowa, 274.]

(*i*) 1 Saund. 335, note (10) to *Hancocke v. Prowd*; *Gorton v. Gregory*, 3 B. & S. 90. [See *ante*, 1896, note (*o*); *Montgomery v. Reynolds*, 14 N. J. (Law) 283; *Phipps v. Addison*, 7 Blackf. 375; *Wilcox v. State*, 24 Texas, 544; *Armstrong v. Johnson*, Minor (Ala.), 169; *Pope v. Robinson*, 1 Stewart (Ala.), 415; *Laughlin v. McDonald*, 1 Missou. 684; *Hill v. Robeson*, 2 Sm. & M. 541; *Priest v. Martin*, 4 Blackf. 311; *Crane v. Hopkins*, 6 Ind. 44; *Lawton v. Buckingham*, 15 Iowa, 22; *Oliver v. Hearne*, 4 Ala. 271; *Rece v. May*, 2 A. K. Marsh. 23; *Luke v. Marshall*, 6 J. J. Marsh. 458; *Sindle v. Kiersted*, 2 Penning. (N. J.) 926; *Lightfoot v. Cole*, 1 Wisc. 27; *Stone v. Kaufman*, 25 Ark. 186; *Ranney v. Thomas*, 45 Missou. 111.] But if the judgment be entered *de bonis propriis*, instead of *bonis testatoris si, &c.* it is considered as a mere clerical mistake, which the court below will amend on motion, even after the record has been removed by error, and argument in the court of error. *Short v.*

Coffin, 5 Burr. 2730; [*Piper v. Goodwin* 23 Maine, 251; *Atkins v. Sawyer*, 1 Pick. 351; *Ware v. St. Louis Bagging & Rope Co.* 47 Ala. 667; *Estate of Schroeder*, 46 Cal. 304.] However, where a plaintiff who was entitled to judgment against a defendant executor *de bonis testatoris et si non, &c.* took judgment and issued execution for debt and costs *de bonis propriis*, the court set aside the judgment and execution on motion. *Ward v. Thomas*, 1 Cr. & M. 532; S. C. 2 Dowl. 87. And the court will not, after a lapse of six years, allow a judgment for the debt *de bonis testatoris*, and for the costs *de bonis testatoris et si non de bonis propriis*, to be altered to a judgment generally *de bonis testatoris et si non de bonis propriis*, even if the latter be clearly the judgment to which the plaintiff was entitled; the distinction being between an alteration to *discharge*, and one to *fix*, the personal liability of the executor. *Burroughs v. Stevens*, 5 Taunt. 556. [In some cases it is held that a judgment against an executor for a debt of the testator should direct the debt to be paid in due course of administration. *Racoullat v. Sansevain*, 32 Cal. 376; *Welch v. Wallace*, 8 Ill. 490; *Bull v. Harris*, 31 Ill. 487; *Thorn v. State*, 10 Texas, 295; *Fortson v. Caldwell*, 17 Texas, 627; *Peck v. Stevens*, 5 Gilman, 127; *Turney v. Gates*, 12 Ill. 141; *Estate of Schroeder*, 46 Cal. 304.]

(*k*) *Wentw. Off. Ex.* 341-346, 14th ed.; *Rock v. Leighton*, 1 Salk. 310; *Ramsden v. Jackson*, 1 Atk. 292, 294; *Erving v. Peters*, 3 T. R. 685; 1 Saund. 335, note (10).

and it is found against him, the judgment is *de bonis testatoris, et si non, &c.* then the costs *de bonis propriis*. (l)

But where the defendant pleads *ne unques executor* or *administrator*, or a release to himself, and it is found against him, the judgment is, that the plaintiff do recover both *the debt and costs*, in the first place, *de bonis testatoris si, &c.* and *si non, &c. de bonis propriis*. (m) The reason alleged is, because the executor cannot but know these to be false pleas. (m¹) But the same reason seems equally to apply to other pleas where the judgment is different. (n)

It may here be observed, that the difference, *in effect*, between these two kinds of judgments against an executor or administrator, is not so great as it may appear at first sight. For, although the judgment is only *de bonis testatoris*, yet the executor, upon a deficiency of assets, must ultimately pay the debt as well as costs recovered, out of his own pocket; because the judgment is in law a proof that he has assets to satisfy it; (o) and, therefore, to a *scire facias* on the judgment, or action of debt suggesting a *devastavit*, the executor cannot plead *plene administravit*, but only controvert the *devastavit*; of which fact the judgment, and the sheriff's return of *nulla bona testatoris*, are almost conclusive evidence, and judgment will be against the defendant *de bonis propriis*. (p)

With respect to the *amount* for which judgment should be entered against the executor upon a plea of *plene administravit*, it is now held that if the executor plead either a general or special *plene administravit*, he is liable only to the amount of the assets proved to be in his hands. (q)

for what amount judgment shall be upon a plea of *plene administravit*: The * case, however, was formerly taken to be, that if

(l) 1 Roll. Abr. 931, D. pl. 3; Wentw. Off. Ex. 344, 14th ed.; [Swearingen v. Pendleton, 4 Serg. & R. 389, 396; Frink v. Layton, 2 Bay, 166.]

(m) Bro. Exors. 34; 1 Roll. Abr. p. 930, C. pl. 2, 8, p. 933, pl. 15; Bull v. Wheeler, Cro. Jac. 648; Wentw. Off. Ex. 338, 340, 14th ed.; 1 Saund. 336 b, note (10); Hooper v. Summersett, Wightw. 20, *per curiam*; [Justices v. Sloan, 7 Geo. 31; Harrison v. Taylor, 1 Brevard, 233; Smith v. Goggans, Harper (S. Car.), 52; Kellogg v. Wilcox, 2 John. 377.]

(m¹) [See Evans v. Pierson, 1 Wend. 30; Moore v. Hunt, 1 Bailey, 370; Robert v. Ditmas, 7 Wend. 522.]

(n) 1 Saund. 336 b, note (10).

(o) *Ante*, 1953, 1954.

(p) 1 Saund. 337, note (1). See *infra*, 1983, 1984 *et seq.* [See Cogan v. Duncan, 23 Miss. 274; Young v. Kennedy, 2 McMullan, 80; Micheau v. Caldwell, 1 Spears (S. Car.) Ch. 22.]

(q) 1 Saund. 219 b, note to Wheatley v. Lane; Jackson v. Lyon, C. & M. 97.

any assets, however small, were proved to be unadministered, the plaintiff was entitled to recover his whole demand from the executor. Indeed, it appears that, anciently, if it was found by verdict that the executor had assets sufficient to satisfy but *part* of the debt, the usual practice of the K. B. was to enter up judgment for the *whole* debt, but to take out *execution* only for the sum found by the verdict; and if the executor was afterwards possessed of more assets, to sue out a *scire facias* on the judgment. (r) But in Easter term, 36 Eliz., the prothonotaries of the common pleas certified that their course was not to enter judgment of the *whole* debt, but only of so much as was found to be in the executor's hands. (s) And the same point was decided by Lord Mansfield, in *Harrison v. Beccles*, (t) where the plaintiff, having proved a debt of 80*l.*, took a verdict on the *non assumpsit* for the sum, and having proved 25*l.* assets unadministered, he took a verdict on the *plene administravit* for that sum, and judgment *quando*, &c. for the residue. (u) It may, perhaps, appear questionable whether there is any real difference between the two modes of practice. For, in the former case, the executor was only bound to pay the assets found by the jury. (x)

[See *Jameson v. Martin*, 3 J. J. Marsh. 330; *Siglar v. Haywood*, 8 Wheat. 675.]

(r) 1 Saund. 336, note.

(s) *Hargthorpe v. Millforth*, Cro. Eliz. 319.

(t) Cited 3 T. R. 688.

(u) *Hancock v. Podmore*, 1 B. & Ad. 265, per Bayley J. accord.; [*Botts v. Fitzpatrick*, 5 B. Mon. 397.]

(x) 1 Saund. 336, note. The following form is taken from Serjt. Williams's note in 1 Saund. 336, for entering up judgment on the two issues of *non assumpsit* by the testator, and of *plene administravit* by the defendant, to which the plaintiff replied that the defendant had assets since the commencement of the suit, where the jury find the first issue for the plaintiff, and, on the second issue, that the defendant has assets to satisfy only *part* of the debt. "As to the first issue between the said parties within joined, upon their oath do say, that the within named William Clarke (the testator) in his lifetime did undertake and promise in manner and form as the

said Francis hath above thereof complained against her the said defendant Mary (the executrix), and they assess the damages of the said Francis by reason of the not performing of the said promises and undertakings, over and above his costs and charges by him about his suit in this behalf expended, to 80*l.*, and for those costs and charges to 40*s.* And as to the last issue between the said parties within joined, the jurors aforesaid upon their oath aforesaid say, that the said Mary, at the time of the commencement of the suit of the said Francis in this behalf, and since had goods and chattels which were of the said William at the time of his death in her hands to be administered to the value of 40*l.*, parcel of the said damages above assessed, wherewith she the said Mary might have satisfied the said Francis 40*l.*, parcel of the said damages; and as to 40*l.* residue of the said damages, that the said Mary, at the time of the commencement of the suit of the said Francis in this behalf, or ever since, had not any

*** When several executors plead *plene administravit severally* by several attorneys, and the jury find that one of them only has assets, judgment shall be given against him only, and the rest shall go quit. (y)** But where the executors *join* in the plea, it was formerly established that judgment should be given against them all, although the jury found assets * in the hands of one only. (z) But it has been considered that the principle of the above mentioned case of *Harrison v. Beccles* will be held to moderate this rule. (a) And accordingly, in a modern case at N. P., (b) where in an action against several executors they all pleaded that they had fully administered, &c. and the plaintiff proved assets in the hands of some only of the defendants, Parke J. directed the jury to find a verdict for the plaintiff against the latter, and, as to the other executors, to find a verdict for the defendants. (c)

If there be a verdict for the defendant, he is entitled to costs as in ordinary cases. It has been held that the statutes 7 Hen. 8, c. 4, s. 3, and 21 Hen. 8, c. 19, s. 3, by which

other goods and chattels which were of the said William at the time of his death in the hands of the said Mary to be administered, wherewith she could have satisfied the said Francis the said 40*l.*, residue of the said damages so assessed as aforesaid. Therefore it is considered that the said Francis do recover against the said Mary the said 40*l.* by the said jury in form aforesaid found, parcel of the said damages of 80*l.* above assessed, together with his costs and charges by the said jury in form aforesaid assessed, and also 35*l.* for his costs and charges of increase by the said court of our said lord the king here adjudged to the said Francis with his assent, which said damages, costs, and charges, in the whole amount to 77*l.*, to be levied of the goods and chattels which were of the said William at the time of his death in the hands of the said Mary to be administered, if she hath as much in her hands to be administered, and if not, then the said costs and charges, parcel of the damages last mentioned, amounting to 37*l.*, to be levied of the proper goods and chattels of the said Mary, and that, &c.

&c. and that the said Francis do recover the said 40*l.* residue of the said damages in form aforesaid assessed, to be levied of the goods and chattels which were of the said William at the time of his death, or which since the pleading of the said second plea [but see *Smith v. Tateham*, *post*, 1982] of the said Mary, have come or at any time hereafter shall come, to the hands of the said Mary to be administered. And the said Mary in mercy," &c.

(y) *Bellew v. Juckleden*, 1 Roll. Abr. 929, B. pl. 5.

(z) 1 Roll. Abr. 929, B. pl. 4.

(a) 1 Saund. 336, note.

(b) *Parsons v. Hancocke*, 1 Mood. & Malk. 330.

(c) See, also, the remarks of the same learned judge in *Cousins v. Paddon*, 2 Cr., M. & R. 558. [A joint administrator cannot complain that several judgments are rendered against him and his co-administrator for the assets found in their hands respectively. *Kavanaugh v. Thompson*, 16 Ala. 817. But see *Dickerson v. Robinson*, 6 N. J. (Law) 195.]

[1977] [1978]

costs are recoverable by the defendant in an action of replevin, extend to avowries made by an executor. (*d*)

It will appear, on referring to the description above given of the proper mode of entering judgment against executors and administrators, (*e*) that, when defendants, they have no privilege as to costs; but, on the contrary, are liable to pay them *de bonis propriis* if there are no assets. (*f*) Therefore, an executor or administrator ought not to plead *non assumpsit*, or other general issues, without a good reason; for if the plaintiff succeeds, the executor will be liable to pay the costs out of his own pocket, although the plea were not false to his knowledge. (*g*) Thus, if the executor or administrator pleads *non assumpsit* and *plene administravit*, if the plaintiff take judgment of assets *in futuro*, upon the * latter plea, and goes to trial upon the plea of *non assumpsit*, he will be entitled to costs, if he obtains a verdict; and such costs to be levied *de bonis propriis* of the executor or administrator, if there are not assets of the testator or intestate sufficient to satisfy them. (*h*) The reason is, that if the defendant had pleaded a plea of *plene administravit* only, the plaintiff might have taken judgment of assets *quando*, without incurring the costs of a trial; but the defendant, by pleading that the testator never promised, compelled the plaintiff to incur those costs; because, in order to avail himself of the judgment of assets *quando acciderint*, he was obliged to go down to trial on the other issue. (*i*) And, therefore, in such cases, unless the executor or administrator has a good ground of defence upon *non assumpsit*, it is usual for him to move to withdraw his plea, which the court will permit him to do upon payment of costs. (*k*) So where an executor pleaded *non assumpsit* and *plene administravit*, on which the plaintiff took issue, and a bond and mortgage outstanding and *plene administravit præter*, on which latter plea the defendant took judgment of assets *quando acciderint*, and there was a verdict for the plaintiff on the plea of *non assumpsit*, and for the defendant on the issue of *plene administravit*; the court held that

(*d*) Tidd, 887, 956, 9th ed.

(*e*) *Ante*, 1974.

(*f*) See 9 B. & C. 658. [See *ante*, 1896, note (*o*); *Giles v. Pratt*, 1 Hill. Ch. 239.]

(*g*) *Dearne v. Grim*, 2 W. Bl. 1275; 1 Saund. 336 b. And a bankrupt executor so pleading after commission sued is

liable to execution for the costs, notwithstanding he has obtained his certificate. *Howard v. Jemmet*, 3 Burr. 1368; S. C. 1 W. Bl. 400.

(*h*) *Marshall v. Willder*, 9 B. & C. 655.

(*i*) 9 B. & C. 657.

(*k*) 2 W. Bl. 1275; Tidd, 980, 9th ed.

the plaintiff, being, at all events, entitled to judgment of assets *quando*, and having been compelled, by the defendant's pleading *non assumpsit*, to go down to trial, was entitled to retain the *postea* and to have the general costs of the trial, though the issue of *plene administravit* was found against him. (l)

But the rule is now established, as in ordinary cases, that the executor or administrator, defendant, will be entitled to the general costs, although he may have pleaded the general issue and failed on it, provided he has pleaded any one plea * which goes to the whole cause of action and succeeded on it. Thus, if the defendant pleads *non assumpsit* and *plene administravit*, and the plaintiff, instead of taking judgment of assets *quando* on the latter, traverses both the pleas, and issues are joined thereon, and that on *plene administravit* is found for the defendant, he will be entitled to a general judgment, and the general costs of the action, although the general issue is found against him. (m) The law is the same where the pleas are the general issue, *ne unques executor*, and *plene administravit*, and the last issue only is found for the defendant. (n)

In an action against an executor or administrator, if the defendant pleads *plene administravit*, and it cannot be proved judgment of assets in futuro: that he has assets in hand, the plaintiff may confess the plea, and take judgment immediately of assets *quando acciderint*, or, as it is sometimes called, judgment of assets *in futuro*. (o) This is an interlocutory or final judgment, according to the nature of the action: and if it be only interlocutory, there must be writ of inquiry, or other proceeding, to complete it. (p) But if the plaintiff take issue on the general or special plea of *plene administravit*, and it be found against him, he cannot have judgment of assets *quando*, &c. (q)

(l) Hindley v. Russell, 12 East, 232; Tidd, 980, 9th ed. [See Nicholson v. Showerman, 6 Wend. 554; Gordon v. Frederick, 1 Munf. 14; Craddock v. Turner, 6 Leigh, 124; Smith v. Goggans, Harper, 52; Kellog v. Wilcox, 2 John. 377; Fort v. Goody, 7 Barb. 388.]

(m) Cockson v. Drinkwater, 3 Dougl. 239; Hogg v. Graham, 4 Taunt. 135; Marshall v. Willder, 9 B. & C. 657; Iggulden v. Terson, 2 Dowl. 277; [Terry v. Vest, 11 Ired. 65.]

(n) Ragg v. Wells, 8 Taunt. 129; Edwards v. Bethel, 1 B. & Ad. 254.

(o) Mary Shipley's case, 8 Co. 134 a; Noell v. Nelson, 2 Saund. 226; Parker v. Dee, 3 Swanst. 532, note to Drewry v. Thacker; [Skinner v. Frierson, 8 Ala. 915; Miller v. Towles, 4 J. J. Marsh. 255; Wilt v. Bird, 7 Blackf. 258.] See the form of such judgment, 2 Saund. 216, 217.

(p) Tidd, 683, 9th ed.

(q) 1 Roll. Abr. 929, B. pl. 2; S. C.

By taking judgment of assets *quando* the plaintiff admits that the defendant has fully administered to that time. (r) * And accordingly, the terms of the judgment are that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* (s) come to the hands of the executor. And in debt or *scire facias*, on this judgment proof of the executor's receiving assets is always at the trial confined to a period subsequent to the judgment. (t) And it is right that such be the rule at law; for if a creditor was permitted to litigate a second time that which has been once settled between the parties, either by verdict or admission, an executor would be harassed and involved in infinite expense and litigation. (u)

It was observed by Lord Kenyon, in *Mara v. Quin*, (x) that it had occurred to him on looking into the precedents, that the ordinary mode of entering up a judgment of assets *quando acciderint* was not correct; for as, on the issue of *plene administravit*, no evidence could be given of assets after the writ sued out, if the judgment were only to affect assets received after the judgment, there was an interval between the commencement of the action and the judgment, in which, if the executors received any assets, they could not be taken at all. His lordship therefore thought that the judgment in such a case ought to be entered up in such a manner as to reach all assets received by the executor after the time of suing out the writ. Upon which Mr. Justice Ashhurst observed, that as the plea of *plene administravit* was, that the executor hath not,

Bro. Exor. 18; 2 Saund. 217, note (1) to Noell v. Nelson; Lucas v. Jenner, 2 Dowl. 64, per Bayley B. But see Hindley v. Russell, 12 East, 232, ante, 1980. The same consequence does not seem to follow where *plene administravit* is ill pleaded. 2 Mac. & G. 414, 415, per Tindal C. J. [But it has been held that, on a plea of *plene administravit*, if the plaintiff takes issue on the plea, and it is found against him, he must pay costs, but may yet have judgment to be paid *quando acciderint*. Burnes v. Burton, 1 A. K. Marsh. 349; Osterhout v. Hardenburgh, 19 John. 266.]

(r) 2 Saund. 219, note (2); Parker v. Dee, 3 Swanst. 522, note to Drewry v. Thacker; [M'Dowall v. Branham, 2 Nott & McCord, 572. In Georgia, a judgment

quando binds all the estate of the defendant's testator or intestate, except such as was in the hands of the representative at the time it was rendered, or such as had been previously administered by him; and third persons cannot take advantage of the form of the judgment to screen property in their possession from liability. Allen v. Matthews, 7 Geo. 149.]

(s) The more proper form, perhaps, is, "after the pleading of the said plea of the said C. D." instead of "thereafter." But see, *contra*, Smith v. Tateham, post, 1995.

(t) Taylor v. Holman, Bull. N. P. 169; 2 Saund. 219 a, note (2).

(u) Mara v. Quin, 6 T. R. 1; 2 Saund. 219 a, note (2).

(x) 6 T. R. 10.

nor had at the time of suing out the writ," "*nor at any time since, any assets,*" &c. he saw no objection to the plaintiff's replying to the latter part of the plea, "*that the executor had assets since,*" &c. if the facts were so. (y)

* But a different view of these points has lately been presented by the court of exchequer in *Smith v. Tateham*. (z) In that case an executor had pleaded *plene administravit*; and the plaintiff replied that after the commencement of the suit and *after plea pleaded*, certain goods of the testator had come into the executor's hands, wherewith he could have satisfied the plaintiff's claims. The replication was held bad on general demurrer, as unprecedented and unnecessary; for that the plaintiff ought to have taken the ordinary judgment of assets *quando*; which, according to the opinions expressed by the barons, embraces not only those assets which were actually received by the hands of the executor after the time when judgment was signed, but also those which came between the issuing of the writ and the judgment, and which *are* or ought to be in his hands, in the due course of administration after judgment. And the dicta of Lord Kenyon and Ashhurst J., above cited, were disapproved of by Parke B. and Rolfe B. (a)

(y) See the form, *ante*, 1976, note (x). [See *Southard v. Potts*, 2 Zabriskie, 278.]

(z) 2 Ex. 205.

(a) The decision in this case that the replication was bad appears to be unquestionably right. But some doubts may be felt whether the reasons above given for it are not in conflict with the earlier authorities. They are certainly irreconcilable with the doctrine that the "*nec unquam postea*" is a necessary part of the plea of *plene administravit*; and that doctrine is founded on no mean support. See *Gewen v. Roll*, Cro. Jac. 132; Com. Dig. tit. Pleader, 2 D. 9, (cited by Littledale J. in *Rees v. Morgan*, 5 B. & Ad. 1037); 2 Saund. 216, note (1), *ante*, 1955. Again in *Barker v. Dee*, reported from Lord Nottingham's MS. in 3 Swanst. 532, note (a), Lord Nottingham asked the counsel for the plaintiff, who had filed a bill in equity for a discovery of assets after a plea by the defendant at law of *plene administravit*, why he did not pray judgment at law upon the plea with a *cesset executio donec assets*

acciderint. Serjeant Maynard answered, that if he had prayed judgment he could have had no advantage but of such assets as should happen *after the plea*, for the prayer admits the plea true, and that there were no assets *at the time of the plea*, "which," said Lord Nottingham, "I held to be a good answer. But the counsel on the other side argued 'that assets before the plea are assets after the plea, and so within the words *cum acciderint*; as a bond paid before the day is a bond paid at the day.' To which I replied, 'true it is assets are always assets till aliened, but it lies not in averment by him who hath admitted the contrary on record by his prayer.'" [In *Orcutt v. Orms*, 3 Paige, 459, where an administrator, in a suit at law against him as such, pleaded *plene administravit*, which was admitted by the plaintiff, who took judgment, to be satisfied out of assets *quando acciderint*, the administrator was held to be protected from accounting for any assets which came to his hands *before the time of plea*; but he was held liable

* When an executor or administrator pleads *plene administravit*, or judgments, &c. outstanding, and *plene administravit* costs on judgment of assets in futuro. *præter*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *quando*, &c. the executor or administrator is not liable to costs *de bonis propriis*; (b) nor does he seem liable thereto, when he pleads *plene administravit præter*, and the plaintiff takes judgment of the assets admitted in part, and for the residue, of assets *quando*, &c. (c) It seems that it was formerly the practice not to allow the plaintiff his costs, even out of the future assets. (d) But it appears to be now settled, that though an executor or administrator, in such case, is not personally liable to pay costs, yet that judgment may be well entered for them, to be recovered *de bonis testatoris, quando acciderint*. (e);

After the plaintiff has obtained a judgment against an executor *de bonis testatoris*, there are two modes of enforcing it. 1st, by *feri facias*, (f) or *scire fieri* inquiry; (f¹) 2d, by an action of debt on the judgment, suggesting a *devastavit*. (f²) Proceedings on judgment against executor *de bonis testatoris*:

to account for assets which came to his hands after that time, as well before judgment as afterwards.]

(b) 1 Saund. 336 b, note; Tidd, 980, 9th ed.; [Pope v. Delavan, 1 Wend. 68.]

(c) Tidd, 980, 9th ed.

(d) Butt v. Deschamps, Tidd, 980, note (d), 9th ed.

(e) De Tastet v. Andrade, 1 Chitt. Rep. 629, 630, in notis; Cox v. Peacock, 4 Dowl. 134. [In North Carolina, a defendant, who is an administrator, is entitled to costs in an action wherein the plea of "fully administered" has been found for him, and a judgment *quando* rendered. Lewis v. Johnston, 69 N. Car. 392.]

(f) He may also proceed to enforce his judgment by attachment of a debt due to the estate of the executor under the stat. 17 & 18 Vict. c. 125, s. 61 (C. L. Procedure Act), and a court of equity will not

restrain such proceedings, notwithstanding there has been a decree for the administration of the estate, if the judgment was obtained before the decree. Fowler v. Roberts, 2 Giff. 226. [In Pennsylvania, after judgment obtained against an executor or administrator, the plaintiff may issue a *scire facias* against such executor or administrator and the heirs or devisees, to recover the same out of the real estate, and such heirs or devisees may make the same defence which they could have made if originally joined in the suit. Murphy's Appeal, 8 Watts & S. 165.]

(f¹) [See Braxton v. Wood, 4 Grattan, 25. By statute in Massachusetts, the real estate of a deceased testator or intestate may be taken on execution on a judgment recovered against his executor or administrator for the proper debt of the deceased, with costs of suit and the fees and

(f²) [In Peaslee v. Kelley, 38 N. H. 380, Bell J. said, "The course of proceeding in England by *scire fieri* inquiry, is unlike any course of proceeding known in our practice." It is provided by statute in

Massachusetts that, when an execution against an executor or administrator for a debt due from the estate of the deceased is returned unsatisfied, the creditor may upon a suggestion of waste sue out a *scire fa-*

First, as to proceeding by *feri facias* or *scire fieri* inquiry: If by *feri facias*: the sheriff returns, as he may do if he pleases, not only *nulla bona* but also a *devastavit*, to a *feri facias de bonis testatoris* sued out on a judgment obtained against an executor, the plaintiff, according to the ancient practice, sued out execution immediately against the defendant by *capias ad satisf.*, or *feri facias de bonis propriis*; (g) and so * he may, it should appear at this day. (h) And it seems that the sheriff runs no great risk by returning a *devastavit*; for the judgment, and no assets to be found, will be sufficient evidence of a *devastavit*, in an action against him for a false return. (i)

But if the sheriff returns *nulla bona* generally, without also by *scire fieri* inquiry: returning *devastavit*, the ancient course was to issue a special writ for the sheriff to inquire by a jury whether the defendant had wasted any of the goods of the deceased. (i¹) And if a *devastavit* were found, and returned by the sheriff, a *scire facias* issued for the defendant to show cause why the plaintiff should not have execution *de bonis propriis*, to which *scire facias* the defendant might appear and plead. But now, for the sake of expedition, the inquiry and *scire facias* are made out in one writ, which is called a *scire fieri* inquiry; reciting the judgment, *feri facias*, and return of *nulla bona*, and after suggesting a *devastavit*,

charges of levying the execution, in like manner as it might have been if the judgment had been rendered and the execution issued and served against the testator or intestate in his lifetime. Genl. Sts. c. 103, §§ 53, 54, 55. The law is similar in some other states. See *Graff v. Smith*, 1 Dall. 481; *Morris v. Smith*, 1 Yeates, 238; *Rowland v. Harbaugh*, 5 Watts, 367; *M'Pherson v. Cunliff*, 11 Serg. & R. 432; *Steel v. Steel*, 4 Allen, 417; *Bells v. Robinson*, 1 Stewart, 193; *Wyman v. Fox*, 55 Maine, 523. But in Illinois a creditor cannot enforce collection of a debt against the deceased by levying an execution on lands left by him. *Stillman v. Young*, 16 Ill.

318. So in Indiana, *O'Brien v. Moody*, 4 McLean, 77; *ante*, 650, note (d¹).]

(g) 1 Saund. 219, note (8) to *Wheatley v. Lane*; [*People v. Judges of Erie*, 4 Cowen, 445. But see *Hussey v. White*, 10 Serg. & R. 346; *Moore v. Kerr*, 10 Serg. & R. 318.]

(h) Tidd, 1025, 1113, 9th ed. The *feri* inquiry is only for the security of the sheriff. *Rock v. Leighton*, 1 Salk. 310; S. C. 1 Ld. Raym. 90; Com. Rep. 87.

(i) *Rock v. Leighton*, cited 3 T. R. 692; S. C. 1 Salk. 310; [Bell J. in *Peaslee v. Kelly*, 38 N. H. 380.]

(i¹) [See *Bank of Alabama v. Hooks*, 2 Porter (Ala.), 271.]

cias against the executor or administrator. If the defendant does not appear and show sufficient cause to the contrary, he shall be deemed guilty of waste, and shall be personally liable for the amount thereof, when it can be ascertained, otherwise for

the amount due on the original judgment, with interest from the time when it was rendered; and judgment and execution shall be awarded as for his own debt. Genl. Sts. Mass. c. 128, § 10.]

commanding the sheriff to cause the debt or damages and costs to be made of the goods of the testator or intestate, if, &c.; and if not, then, if it shall appear by inquisition that the defendant hath wasted the goods of the deceased, to give notice to the defendant to appear in court at the return of the writ to show cause why the plaintiff ought not to have execution *de bonis propriis*. And there must be the same notice of executing such writ, as of a common writ of inquiry. (*j*)

The most usual mode of proceeding has been by action of debt on the judgment suggesting a *devastavit*; because in the proceeding by *scire fieri* inquiry, the plaintiff was not, until the passing of the act for the further amendment of the law, entitled to costs, unless the executor appeared and *pleaded to the *scire facias*. For the statute 8 & 9 W. 3, c. 11, s. 8, which gives costs to plaintiffs in suits upon *scire facias*, limits them to those cases only where the plaintiff obtains judgment, or award of execution, *upon a plea pleaded, or demurrer joined thereon*. (*k*) But now by statute 3 & 4 W. 4, c. 42, s. 34, it is enacted, that in all writs of *scire facias*, the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default as well as upon a judgment after plea pleaded, or demurrer joined.

The executor cannot plead *plene administravit* to the *scire fieri* inquiry; because the judgment against him is conclusive that he had assets to satisfy it. (*l*) Neither can he, upon the taking of the inquisition, give in evidence the want of assets. (*m*) And it should therefore seem, that the jury are bound, upon the judgment being put in evidence, together with the *fi. fa.* and the re-

.(*j*) Tidd, 1113, 1114, 9th ed. See the account of the establishment of this practice. 1 Saund. 219 *a*, note to *Wheatley v. Lane*.

(*k*) 1 Saund. 219 *a*. And it must be observed, that by sect. 5 of this statute it is provided that nothing therein contained shall extend to executors and administrators. Consequently, it should seem, that even after plea pleaded or demurrer joined, costs in *scire facias* were not recoverable against them under the stat. of W. 3.

(*l*) See *ante*, 1953, 1954. [An action of debt lies on a judgment against an admin-

istrator, but such judgment is not evidence in Mississippi that he had assets, or had committed a *devastavit*. These facts must be proved by other evidence. *Lee v. Gardner*, 26 Miss. 521. As to the extent of relief in equity for an executor or administrator against judgments at law, when the assets have been taken from him, or lost, &c. without his fault, see *Royall v. Johnson*, 1 Rand. 421; *Miller v. Rice*, 1 Rand. 438; *Pickett v. Stewart*, 1 Rand. 478; *Pendleton v. Stuart*, 6 Munf. 377.]

(*m*) 1 Saund. 219 *d*.

turn, to find a *devastavit*, as suggested in the writ, unless the executor can show that there were goods of the testator which might have been taken in execution, and that he showed them to the sheriff. (n) Accordingly, in a case where the under-sheriff, on taking the inquest, directed the jury that the plaintiff was bound to give evidence of the executor's having property of the testator in his hands, and subsequently returned *nulla bona testatoris*, the court quashed the return and awarded a new *scire fieri* inquiry. (o) However, the return of a *devastavit* is not conclusive, whether found by the inquisition or returned by the sheriff; and therefore the executor may traverse it, by denying the *devastavit*, and taking issue on * it. (p) And upon the trial of such an issue he may show that he had not wasted the goods of the testator, but was ready to give them to the sheriff, so that it was the sheriff's fault that he did not make the debt out of them. (q)

In *Blackmor v. Mercer*, (r) in an inquisition returned by the sheriff on a *scire fieri* inquiry, it was found that the executors *had sold, eloigned, converted, and disposed to their own use* divers goods of the testator. The defendants came in and traversed that they sold, eloigned, &c. and the plaintiff maintained the inquisition that they had sold, eloigned, &c. as it was found by the inquisition, and tendered an issue on it, to which the defendants demurred. And it was objected that here neither the inquisition, nor the plaintiff's replication were sufficient to charge the defendants *de bonis propriis*; for no *devastavit* was found by the inquisition, or alleged by the plaintiff; and the defendants might have well sold, eloigned, and disposed of the testator's goods, because they had paid the testator's debt to the value of the goods with their own money, and therefore; although it was a sale, eloignment, or conversion, yet it was no *devastavit*; wherefore there ought to have been a *devastavit* found or alleged, otherwise the defendants were not chargeable of their own goods. *Sed non allocatur*; for, by Hale, chief justice, perhaps the defendants had not actually wasted the goods of the testator, but had them in their hands in *specie*, and kept them so secretly that the sheriff

(n) *Ib.*; *Leonard v. Simpson*, 2 Bing. N. C. 179, 180.

(o) *Palmer v. Waller*, 1 M. & W. 689; S. C. 5 Dowl. 315.

(p) 1 Saund. 219 c; *Merchant v. Dri-*

ver, *Ib.* 306; *Blackmor v. Mercer*, 2 Saund. 402.

(q) See 1 Saund. 219 c; Bing. N. C. 180, 181.

(r) 2 Saund. 402.

could not find them to levy the plaintiff's debt upon them; therefore it is reasonable that the defendants should be charged *de bonis propriis*, although there is no *devastavit* in the case. And for this reason it was adjudged for the plaintiff. (s)

The action of debt on the judgment suggesting a *devastavit* was substituted in lieu of the proceeding by *scire fieri* *inquiry. (t) The foundation of this action is the judgment obtained against the executor; (t¹) which, as there has been already occasion to show, (u) is conclusive upon him to show that he has assets to satisfy such judgment. (u¹) If, therefore, upon a *fieri facias de bonis testatoris*, on a judgment obtained against an executor, either no goods can be found which were the testator's, or not sufficient to satisfy the demand (or, which is the same thing, if the executor will not expose them to the execution), that is evidence of a *devastavit*; and, therefore, it is very reasonable that the executor should become personally liable and chargeable *de bonis propriis*. (x) And the mode of proceeding is immaterial, because the executor is entitled to the same defence in debt upon the judgment suggesting a *devastavit*, as in the proceeding by a *scire fieri* inquiry. (y)

This action may be brought upon the judgment against the executor, upon a bare suggestion of a *devastavit*, without any writ of *fi. fa.* first taken out upon the judgment. (z) But the usual course is, first to sue out a *fieri facias* upon the judgment, and, upon the sheriff's return of *nulla bona*, to bring the action, and state the judgment, the writ, and return, in the declaration; and, on the trial, the record of the judgment, the *fieri facias*, and the return, will be sufficient evidence to prove the case. (a)

(s) See, also, *S. P. Merchant v. Driver*, 1 Saund. 307.

(t) *Berwick v. Andrews*, 2 Ld. Raym. 974; 1 Saund. 219 a, note; [Bell J. in *Peaslee v. Kelley*, 38 N. H. 380, cited ante, 1983, note (f¹).]

(t¹) [See *Vanhorn v. Teasdale*, 4 Halst. 379.]

(u) *Ante*, 1953, 1954.

(u¹) [Goodwin v. Wilson, 1 Blackf. 344; Bell J. in *Peaslee v. Kelley*, 38 N. H. 380.]

(x) 1 Saund. 219 b, note (8) to *Wheatley v. Lane*; *Blackmor v. Mercer*, 2 Saund. 403; *Erving v. Peters*, 3 T. R.

686; *Farr v. Newman*, 4 T. R. 637; [*Newcomb v. Goss*, 1 Met. 333; *Mead v. Kilday*, 2 Watts, 110.]

(y) 1 Saund. 219 b, note.

(z) *Wheatley v. Lane*, 1 Sid. 397; 1 Saund. 219 c, note.

(a) *Challoner v. Challoner*, cited in *Skelton v. Hawling*, 1 Wils. 259; *Erving v. Peters*, 3 T. R. 685; 1 Saund. 219 c. S. P. where an irregular *testatum fi. fa.* had been issued and returned *nulla bona*, *Leonard v. Simpson*, 2 Bing. N. C. 176; S. C. 2 Scott, 335. [In *Peaslee v. Kelley*, 38 N. H. 380, 381, Bell J. having quoted the remarks in the text, says: "This ci-

The action, is, in form, an action of debt in the *debet* and *detinet*, and the judgment is *de bonis propriis*. (b) The executor * or administrator may plead that he did not waste, &c. in manner and form, &c. and under this plea he may give in evidence that there were goods of the testator which might have been taken in execution, and that he showed them to the sheriff. (c) But the executor or administrator cannot plead *plene administravit*, or any other plea which puts his defence upon want of assets. For such plea would be contrary to what is admitted by the judgment. And if the truth were, that he had no assets, he should have set it up as a defence to the original action, and having neglected to do so, he shall not be permitted to say so afterwards. (d) Again, if he has pleaded *plene administravit* to the original action, and the judgment was had upon a verdict finding that *he had* assets, he is, of course, equally concluded from saying that he had no assets. (e) And, for the same reason, he cannot *give in evidence* the want of assets on the trial of the *devastavit*. (f) Accordingly, in a modern case, (g) in assumpsit against an executrix and two executors for a debt due from the testator, the executors severally pleaded *plene administravit* and the executrix pleaded *plene administravit* except as to 383*l.* 6*s.* 7*d.* and also, except as to certain goods, of the value of 481*l.* 13*s.* 6*d.*; whereupon the plaintiff

tation seems to be conclusive as to what is material in an action of *scire facias*, and the necessary evidence to be offered to charge an executor *de bonis propriis*; the judgment, the execution, and the return of *nulla bona*. If waste is alleged, it is not necessary to prove it, nor to offer any other evidence tending to that result." See *Cope v. McFarland*, 2 Head (Tenn.), 543.]

(b) *Warren v. Consett*, 2 Ld. Raym. 1502. But a declaration in the *detinet* is at any rate cured by verdict; and it seems that, independent of the verdict, the plaintiff, on such a declaration, may take judgment *de bonis testatoris*. *Hope v. Bague*, 3 East, 2.

(c) 1 Saund. 219 c, note; *ante*, 1986. The same defence might formerly have been set up under a plea of *nil debet*. *Coppin v. Carter*, 1 T. R. 462. But now by Reg. Gen. H. T. 1853, r. 11, the plea of

nil debet shall not be allowed in any action.

(d) 1 Saund. 219 c, note.

(e) 1 T. R. 693.

(f) 1 Salk. 310. Nor upon a writ of inquiry after judgment by default in the original action. *Treil v. Edwards*, 6 Mod. 308; *Wharton v. Richardson*, 2 Stra. 1075; S. C. cited 1 Wils. 258; 1 Saund. 219 c, note. The rule is the same where the executor has pleaded, in the action of debt suggesting a *devastavit* that he had fully administered, without this, that he elogned or wasted, whereupon issue had been joined; for the averment in such a plea that the defendant had fully administered is immaterial, and the issue is on the *devastavit* only. *Dawson v. Gregory*, 7 Q. B. 756.

(g) *Cooper v. Taylor*, 6 M. & Gr. 989; S. C. 7 Scott N. R. 951.

*signed judgment for 1,280*l.* 13*s.* 0*d.* to be levied, as to 865*l.* 0*s.* 1*d.*, out of the assets confessed, and as to the residue, of assets *in futuro*. Under a *fi. fa.* thereon the goods produced 400*l.* 9*s.* 5*d.* and the executrix gave a check on the bankers with whom the 383*l.* 6*s.* 7*d.* had been deposited, which was dishonored on the ground that her co-executors had not signed it. Afterwards the plaintiff brought an action of debt suggesting a *devastavit* against the executrix, to which she pleaded that she did not waste, &c. And it was held that she was bound by her admission that the money was in her hands, and that, although there had been no return of *nulla bona testatoris* to the writ of *fi. fa.* there was sufficient evidence of a *devastavit* to the amount of 383*l.* 6*s.* 7*d.*

If a man obtains judgment against an executor, and dies, his executor may, without first suing out a *scire facias*, or writ of revivor, bring an action of debt, upon the judgment against the executor, suggesting a *devastavit*; for the action is brought against the same person against whom the judgment was had, and by that judgment assets were admitted. (*h*) So, on the other hand, if a judgment be had against an executor, who afterwards dies, an action may, since the stat. Car. 2, c. 7, (*i*) be brought against his executor or administrator, upon the judgment, suggesting a *devastavit* by the first executor, and the judgment is as conclusive upon the representative of the executor as it is upon the executor himself. Therefore, if an action of debt, suggesting a *devastavit* by the first executor in his lifetime, be brought against *his* executor or administrator, he cannot plead that the first executor fully administered the goods of the first testator, or any other plea purporting that he (that is, the first executor) had no assets to satisfy the judgment, any more than the executor himself could have done. (*k*) For whatever act of the executor would have made him personally *liable and chargeable with the payment of the demand *de bonis propriis*, will now, by virtue of the statute, make his *personal estate* liable in the hands of his executor or administrator. (*l*) But the executor or administrator of the executor may plead that he, the defendant, has fully administered all the estate of his own testator or intestate. (*m*) Moreover the action, when

(*h*) *Berwick v. Andrews*, 2 *Ld. Raym.* 971; *S. C.* 6 *Mod.* 125; 1 *Salk.* 314; *ante*, 791.

(*i*) See *ante*, 1629.

(*k*) *Skelton v. Hawling*, 1 *Wils.* 258.

(*l*) 1 *Saund.* 219 *d*, note.

(*m*) 1 *Saund.* 219 *e*, note. See *infra*, 1998, 1999.

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brought against the executor or administrator of the executor, against whom the judgment was obtained, must be in the *detinet* only, and the judgment is *de bonis testatoris* or *intestati*. (n)

But no action of debt suggesting a *devastavit* by the executor lies against him upon a judgment obtained *against his testator*; because that is no admission of assets by the executor; and, therefore, in such cases, it is necessary to revive the judgment against the executor, to make him a party to it. (o)

If the testator died after execution was sued out, the writ may, it should seem, be still executed on his goods in the hands of his executors, without taking any further proceeding. (p)

But, generally speaking, if a defendant dies after final judgment against him, and before execution, the plaintiff cannot have execution without reviving the judgment against the personal representative of the defendant. (q) If, indeed, * there are two or more defendants, and one of them dies after judgment, but before execution, the plaintiff is not put to revive the judgment against the personal representative of the deceased, but execution may be had without it against the survivors, within a year. (r) But the execution in such case should be taken out in the joint names of all the defendants, otherwise it will not be warranted by the judgment. (s)

Before the common law procedure act, 1852, the judgment was revived by a writ of *scire facias*, which stated that the testator died, having made the defendant his executor, or, in the case of

(n) 1 Saund. 219 f, note.

(o) Crosby v. Gaering, cited in Berwick v. Andrews, 2 Ld. Raym. 972.

(p) 1 Chitty's Archb. 569, edition by Prentice. At common law the execution creditor might have issued, the *fi. fa.* after the death, but tested in the lifetime, of the testator. 1 Saund. 219 f. And this right continued notwithstanding the stat. 3 & 4 W. 4, c. 67, s. 2; Brocher v. Pond, 2 Dowl. 472; Harmer v. Johnson, 14 M. & W. 342, by Parke B. But as Reg. Gen. r. 72, of H. T. 1853, directs that every writ of execution shall bear date on the day on which the same shall be issued, this is no longer allowable.

(q) 2 Saund. 6, note (1) to Jeffreson v.

Morton; [Handley v. Fitzhugh, 3 A. K. Marsh. 561; Gwin v. Latimer, 4 Yerger, 22.] If there are several executors, a rule nisi to revive a judgment against the testator must be served on all who have proved the will. Panter v. Seaman, 5 Nev. & M. 679. If the original executor is dead, the proceedings may be against his executor; but if the representative of the deceased executor is an administrator, or if the original representative of him against whom judgment is recovered was an administrator, then the proceedings must be against the administrator *de bonis non*. See *ante*, 471-473.

(r) Tidd, 1120, 9th ed.

(s) Tidd, 1120, 9th ed.

an administrator, the death of the intestate, and the grant of administration; and it called on the defendant to show why the plaintiff should not have execution of the debt or damages, to be levied of the goods and chattels which were of the testator or intestate at the time of his death, in the defendant's hands to be administered, &c. (t)

But now, under that statute the plaintiff may either sue out a writ of revivor in the form given by the act, or apply to the court or a judge for leave to enter a suggestion on the roll, that he is entitled to have execution thereon. And the act, in the 129th and two following sections, prescribes the mode of proceeding, and course to be pursued in respect of each of these substitutes for a *scire facias*. It is deemed more advisable to refer the reader to them, and to the books of practice, for details, than further to enlarge this work by inserting them in this place. (u)

* By sect. 131, "The venue in a declaration upon the writ of revivor may be laid in any county, and the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action."

With respect to the pleas which an executor or administrator may plead in his defence, it was said that if he pleaded *plene administravit* it was bad on a special, though good on a general, demurrer; but he ought to plead that he had nothing in his hands at the time of the death of his testator or intestate, or that no goods came to his hands except so much, if any did, and show how he administered them. (v) But this seems questionable, and, indeed, Lord Holt said in the case of *Newton v. Richards*, (x) that precedents prevailed with him more than the reason of the thing. And the plea was pleaded in *Hickey v. Hayter*, (y) without any objection. (z) Where the judgment on which the *scire facias* was brought was not docketed pursuant to the stat. 4 & 5 W. & M. c. 20, (a) it was held that the executor or adminis-

(t) Tidd, 1119, 9th ed. In a *scire facias* on a judgment recovered by an executor, the death of the testator need not have been expressly averred. *Moorfoot v. Chivers*, 1 Stra. 631; S. C. 2 Ld. Raym. 1395; Tidd, *ubi supra*. *Petchet v. Woolston*, Aleyn, 47, 48; *Newton v. Richards*, 1 Salk. 296; S. C. Comberb. 298; Skinn. 565; 4 Mod. 296; 1 Ld. Raym. 3, 4; 2 Saund. 72 *dd*, note (4); [*Kearney v. Sascor*, 37 Md. 277.]

(x) *Ubi supra*.

(u) See *Stratford v. Baker*, L. R. 4 Eq. Ca. 256.

(y) 6 T. R. 384.

(v) *Harecourt v. Wrenham*, Moore, 858; *Ordway v. Godfrey*, Cro. Eliz. 575;

(z) See, also, *Hall v. Tapper*, 3 B. & Ad. 655; *ante*, 999.

(a) See *ante*, 999.

trator might give in evidence, under a plea of *plene administravit*, the payment of other debts before action brought, which exhausted all the assets. (b) And that it was not necessary for the defendant to allege in his plea that there was no docket. (c)

* A plea by the executor that a writ of error is pending on the judgment is bad; for the object of the proceedings is to make the executor party to the judgment; and the court, in awarding the execution as prayed, does not say that it shall immediately be enforced. (d)

After the plaintiff has obtained judgment of execution against the executor, he may bring an action of debt in the *debet* and *detinet* on the latter judgment against the executor, suggesting a *devastavit*. And in such action the judgment is conclusive against the defendant that he has assets. Therefore he cannot plead *plene administravit*; and the judgment shall be *de bonis propriis*. (e) However, if the plaintiff pleases, he may bring the action in the *detinet*, and take judgment *de bonis testatoris*. (f)

If a person taken on a *ca. sa.* died in execution, it was formerly holden that the plaintiff had no further remedy. But now, by stat. 21 Jac. 1, c. 24, he may sue out new execution against the lands and tenements, goods and chattels, of the deceased, in the same manner as if such person had never been taken in execution. It has been held that if a defendant dies in execution, a *fi. fa.* tested and returnable when he was alive and in execution, will support a *testatum fi. fa.* issued under this statute into a foreign county. (g)

If a judgment of assets *quando acciderint* has been entered against an executor and administrator, the plaintiff cannot have execution until some assets come into the hands of the defendant, when the plaintiff may bring an action of debt upon the judgment, or proceed by the writ of revivor, substituted by the C. L. P. Act, 1852, in lieu of

Proceed-
ings on
judgment
of assets
in futuro.

(b) Hickey v. Hayter, 6 T. R. 384. But see stat. 2 Vict. c. 11, and *ante*, 1001.

(c) Hall v. Tapper, 3 B. & Ad. 655. In a case where judgment was set aside on payment of costs, which were tendered after the death of the defendant, and the plaintiff proceeded to set aside the rule, before any administrator was appointed, and commenced a *sci. fa.* on the judg-

ment, the court, on terms, permitted the administrator to come in and defend, and set aside all the proceedings subsequent to the declaration. Cash v. Cock, 2 Dowl. 3.

(d) Snook v. Mattock, 5 Ad. & El. 239.

(e) Hope v. Bague, 3 East, 2.

(f) *Ib.*

(g) Farncombe v. Kent, 2 Dowl. 46.

a *scire facias*. (*h*) Indeed, where the executor or administrator pleads several * judgments outstanding, and the plaintiff takes judgment of assets *in futuro*, the future assets shall be in the first place applied to those judgments. (*i*) Hence there is a difference as to the future assets, between a plea of *plene administravit* generally, and a special plea of *plene administravit præter* judgments. (*k*)

If the judgment is in the ordinary form, it has been held necessary to state, in the writ of *scire facias*, that the assets came to the executor's hands *after* the judgment; for that the *scire facias* must pursue the terms of the judgment, which, in this case, are, that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* come to the hands of the executor. Therefore, where a *scire facias*, on such a judgment as this, of assets *quando acciderint*, stated that divers goods, &c. of the testator, sufficient to pay, &c. had come to, and were in the hands of the defendant to be administered, &c. without stating that those goods had come to the defendant's hands *since the judgment*, and prayed execution against the defendant to be levied of those goods, according to the form and effect of his said recovery, &c. the defendant pleaded, that *after the plaintiff's judgment*, no goods, &c. of the testator had come to the defendant's hands to be administered, &c.; to which the plaintiff replied, that divers goods, &c. had come to the defendant's hands, without adding, *since the judgment*; and on demurrer it was adjudged that the *scire facias* was wrong, for want of the words "*after the judgment*." For when an executor pleads *plene administravit*, the plaintiff may either deny or admit that allegation; if he admits it, he takes judgment, and prays that his debt may be levied of such assets as may *afterwards* come to the hands of the executor to be administered; the praying of judgment is an admission that there are no assets in the executor's hands at that time. (*l*)

(*h*) *Ante*, 1990, 1991. By the C. L. P. Act, 1854, s. 91, "Proceedings against executors upon a judgment of assets *in futuro* may be had and taken in the manner provided by the C. L. P. Act, 1852, as to writs of revivor." See the form of the *scire facias*, Noell v. Nelson, 2 Saund. 219. first proceeds upon his judgment *quando*, and fixes the administrator with assets, must first be paid, without any regard to priority of judgments. McLean v. Leach, 68 N. Car. 95; Dancy v. Pope, 68 N. Car. 147.]

(*i*) Parker v. Atfield, 1 Salk. 312. See, also, Poulett v. Wightman, 1 Bligh N. S. 138. [In North Carolina, the creditor who (k) 1 Saund. 336 b, note. (l) Taylor v. Holman, Bull. N. P. 169; 2 Saund. 219 a, note. But see Smith v. Tateham, 2 Ex. 205; *ante*, 1981.]

* Where, upon a suggestion of assets, a *scire facias* was taken out, and assets were found for part, judgment was given to recover so much immediately, and the residue of assets *in futuro*. (m)

At common law, the death of a sole plaintiff or defendant, at any time before final judgment, would have abated the suit. (n) But now, by the stat. 17 Car. 2, c. 8, s. 1, as well as by the common law procedure act, 1852, s. 139, the death of either party between verdict and judgment shall not be alleged as error, so as such judgment shall be entered within two terms after such verdict. The construction which these statutes have received, and the proper mode of taking the benefit of them, have been already considered in a previous part of this treatise. (o)

If either the plaintiff or defendant happens to die after interlocutory and before final judgment, it is provided by the common law procedure act, 1852, s. 140, that the action shall not abate, if it might have been originally maintained by or against the executors or administrators of the party dying; but the plaintiff, or if he be dead after such interlocutory judgment, his executors or administrators, shall have a writ of revivor against the defendant if living after such interlocutory judgment, or if he died after, against his executors or administrators, &c. This enactment, also, and its construction and operation, have been discussed in an earlier stage of this work. (p)

In a case (q) where the plaintiff brought an action against two defendants, and proceeded to outlawry against one, and * went on with the action against the other, who died after interlocutory and before final judgment, it was held that he could not have a *scire facias* against his administrator; for, notwithstanding the outlawry, the action remained joint, and therefore survived against the other defendant. (r)

Where the death of the defendant happens after interlocutory

(m) *Perryman v. Westwood*, cited in 1 Vent. 95, and 1 Sid. 448.

(n) *Ante*, 891. Where judgment was signed at the opening of the office at eleven o'clock, and the defendant died at half past nine A. M., the judgment was held regular, because judicial proceedings are to be considered as having taken

place at the earliest period of the day on which they are done. *Wright v. Mills*, 4 H. & N. 488.

(o) *Ante*, 892.

(p) *Ante*, 894, 895.

(q) *Fort v. Oliver*, 1 M. & Sel. 242.

(r) See *ante*, 902.

judgment, and before the execution of the writ of inquiry, the form of the writ of revivor ought to be for the executors or administrators to show cause why the damages should not be *assessed* and recovered against them. (s) And where the defendant dies after the execution of the writ of inquiry, but before the return of it, the writ should be to show cause why the damages assessed by the jury should not be *adjudged* to the plaintiff. (t)

The final judgment upon the writ of inquiry, after interlocutory judgment revived under the 140th section of the common law procedure act, must be against the *executor or administrator*, and not against the *testator or intestate himself*, as it is upon the 139th section and upon the stat. of Car. 2; and therefore it cannot be pleaded as a judgment against the testator or intestate. (u)

It must be also mentioned in this place, that where the defendant dies, after interlocutory and before final judgment, the plaintiff must sue out two writs of revivor to entitle himself to take out execution; one before final judgment to make the executors or administrators parties to the record, the other after final judgment to give them the opportunity of pleading the want of assets, or any other matter that an executor may plead in his defence to proceedings of revivor brought upon a final judgment obtained against his testator; for it would be unreasonable that the executors or administrators should be in a worse situation where their testator or intestate died before final * judgment, than they would have been in if he had died after. (x)

So in a modern case in the house of lords, (y) before the common law procedure act, the defendant died intestate after interlocutory judgment and a writ of inquest of damages executed; but before it was returned, the plaintiff declared in *scire facias* against the administrator, who pleaded *plene administravit*, and set forth in his pleas divers specialties due and owing from the intestate, and charging the estate. The plaintiff having replied, admitted the truth of the pleas, and praying judgment and execution of the goods of the intestate *quando acciderint*, entered up final judgment "to have execution against the defendant, as administrator,

(s) *Smith v. Harmon*, 1 Salk. 315; 2 Saund. 72 *q*, note.

(t) *Goldsworthy v. Southcott*, 1 Wils. 243; 2 Saund. 72 *r*, note.

(u) *Weston v. James*, 1 Salk. 42; 2 Saund. 72 *r*, note; *ante*, 898.

(x) *Tomkins v. Gratton*, Say. Rep. 266; 2 Saund. 72 *r*, note.

(y) *Poulett v. Wightman*, 1 Bligh N. S. 138.

according to the force, form, and effect *of the said recovery* ;” no recovery having been before stated in any part of the proceedings on the record, and no final judgment having been given in the original action, and no provision being made by the judgment for the payment of the specialty debts. And it was held that the judgment was erroneous, and it was reversed with costs.

To the writ of revivor upon the interlocutory judgment the defendant’s executor cannot plead a judgment obtained against him on a bond due to the testator, and no assets *ultra*, or any plea of a similar nature ; for the statute did not intend that the executor should be in a better situation, as to the assessing of damages upon the inquiry, than his testator, who could have pleaded nothing but a release, or other matter in bar arising *puis darrein continuance*. (z) But * to the writ of revivor after final judgment, the executor or administrator may plead *plene administravit*. (a)

Proceeding in case of death of sole or surviving defendant before verdict or judgment by default. It may here be mentioned, that by the 138th section of the common law procedure act, 1852, in case of the death of a sole defendant, or surviving defendant, before verdict or judgment by default, where the action survives, the plaintiff may make a suggestion of the death of the defendant, and proceed, in the course prescribed by the act, to substitute his executor or administrator as a defendant. (a¹) The object of the act appears to be to place the personal representative, after these steps have been taken, in the same position as to costs as well as other matters, as if he had been the original defendant on the record. Therefore the court will not allow the plaintiff to discontinue without the payment of all the costs of the cause to the executor or administrator who has been so substituted as defendant. (b)

In case of the death of parties to writs of error. The common law procedure act, 1852, has also, by the 161st and five following sections, made provisions for the death of parties to writs of error, correspond-

(z) *Smith v. Harmon*, 1 Salk. 315 ; S. C. 6 Mod. 142. There seems to be a mistake in the report in stating that the intestate sued the *executor*, and obtained interlocutory judgment against him. From the reasons on which the decision appears to be founded, the fact seems to have been, that the intestate obtained interlocutory judgment against the *testator*, and a *scire* *facias* was sued out against his *executor*. 2 Saund. 72 *et seq.*

(a) See *ante*, 1996.

(a¹) [See *ante*, 1883, note (q¹).]

(b) *Benge v. Swaine*, 15 C. B. 784. As to the mode by which the executor or administrator may compel the continuance or abandonment of the suit, see common law procedure act, 1854, s. 92 ; *ante*, 892, note (c).

ing in substance with those relating to the death of parties in the earlier stage of the proceedings. (c)

It may also be mentioned, that since, under that statute, the action of ejectment has ceased to be a fictitious proceeding, and is now brought by and against the real parties interested, it was requisite to provide for the continuation of the action on the death of any of the parties, in the same way as in ordinary actions; which has been done by the 190th and nine following sections. (d)

Consequence of the death of a party to an action of ejectment.

For those causes of action which are sustainable against * an executor in respect of the acts of the deceased, the plaintiff, on the death of a *sole* executor, may maintain the action against his executor; for the executor of such executor is, to all intents and purposes, the executor and representative of the first testator. (e) But on the death of an executor without appointing an executor of his own, or on the death of an administrator, the actions above mentioned must be brought against the administrator *de bonis non*. (f)

Remedies against executor of executor.

With respect to the remedies for the *devastavit* of an executor or administrator, in the event of his death, it has already appeared (g) that, at common law, no executor or administrator was answerable for a *devastavit* by his testator or intestate. But by the statute 30 Car. 2, c. 7, and 4 & 5 W. & M. c. 24, s. 12, this defect has been remedied. (h) So that, since these statutes, if a judgment be recovered against an executor, who afterwards dies, an action may now be brought against his executor or administrator, suggesting a *devastavit* by the first executor. (i) And in every case where the executor in his lifetime was in any way guilty of any act which amounts in law to a *devastavit*, such as exhausting the assets by payment of debts of an inferior degree before those of a superior, and the like, an action may be brought against the executor or administrator of such executor, suggesting

(c) See Chitty's Archbold, 514, Prentice's ed.

(d) See Quain and Holroyd's Treatise on the Common Law Procedure Act, 138 *et seq.*

(e) See *ante*, 254.

(f) See *ante*, 470.

(g) *Ante*, 1729.

(h) *Ante*, 1729. See the observations

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of Wood V. C. on these statutes, in Thorne v. Kerr, 2 Kay & J. 63, 64. But the statute of 30 Car. 2 was held not to make an executor of an executrix *de son tort* liable for a breach of contract committed by the person with whose property the executrix *de son tort* has intermeddled. Wilson v. Hodson, L. R. 7 Ex. 84.

(i) See *ante* 1989.

a *devastavit* by the former executor. (*k*) Such actions must obviously be brought in the *detinet* only, and the judgment must be *de bonis testatoris*. (*l*)

It may be mentioned that in one case the court permitted * a suggestion to be entered on the roll, under the court of requests' act, in an action brought by an administrator. (*m*) But in an action brought *against* an executor they refused it, saying that it could not be meant to give the court of conscience a jurisdiction over executors; and that, if there was no express exception, there was one implied from the nature and reason of the thing. (*n*) By the 66th section of the county courts act (9 & 10 Vict. c. 95), an executor or administrator may be sued in the county court as if he were a party in his own right. (*o*)

Executors and administrators are within the custom of foreign attachment; and, therefore, if a plaint be entered in the court of the mayor or sheriff of London against an executor or administrator, the plaintiff may attach money or goods belonging to the deceased in the hands of another within the city. (*p*) But a debt due to the deceased cannot be attached on a plaint against his personal representative, although he be sued under that description, unless he be sued for a debt due from the deceased. (*q*) Nor shall there be an attachment, for the debt of a testator, of goods or money in the hands of the executor, unless they were due or belonging to the testator at the time of his death, although they be assets; as, if an executor sell the goods of the testator, the money cannot be attached in his hands. (*r*) Nor, if he take a bond for a debt due to the testator, can the money payable on the money be attached. (*s*)

(*k*) 1 Saund. 219 *e, f*, note (8) to Wheatley v. Lane; Coward v. Gregory, L. R. 2 C. P. 153, 173.

(*l*) *Ib.*

(*m*) Wase v. Wyburd, Dougl. 246.

(*n*) Ailway v. Burrows, Dougl. 263.

(*o*) See *ante*, 1898.

(*p*) Masters v. Lewis, 1 Ld. Raym. 57; S. C. 3 Salk. 49; Com. Dig. Attachment, B.; Fisher v. Lane, 3 Wils. 297; S. C. 2 W. Bl. 834. (See, however, *contra*, Barrymore v. Taylor, 1 Esp. 326, per Lord

Kenyon.) But the creditor of an intestate could not, under the custom of London, attach any of his debts by levying a plaint against the ordinary. 1 Ld. Raym. 57; 3 Salk. 49.

(*q*) Com. Dig. Attachment, D.; Hodges v. Cox, Cro. Eliz. 843; Toller, 478.

(*r*) Horsam v. Target, 1 Ventr. 113; S. C. 1 Lev. 306; Com. Dig. Attachment, D.

(*s*) *Ib.*

Nor, if an * executor recover damages in trespass for the testator's goods, or on a covenant made with him, can there be an attachment of the damages. (*t*) Nor, if money be awarded to an executor on a submission by him of controversies between his testator and another person, can the money due by the award be attached. (*u*) Nor can there be an attachment of a legacy; for creditors have an interest in it, and they are incapable of being warned. (*x*) A creditor who after his debtor's death obtains an attachment against part of the assets, gains no priority as against the other creditors of the deceased. (*y*)

Where the lessee of lands dies before the expiration of the term and his executor or administrator continues in possession during the remainder, a distress may be taken for rent due for the whole term. (*z*) And the executor or administrator cannot plead *plene administravit* in bar to the avowry. (*a*) So the distress may be taken by virtue of the stat. 8 Ann. c. 14, ss. 6 and 7, within six months after the determination of the tenancy, if the executor or administrator continues in possession. (*b*)

The death of either party is the countermand of a warrant of attorney to confess judgment; (*c*) and, therefore, upon a motion to enter up judgment, if it appeared that the defendant is dead, the court will not grant the motion. (*d*)

Remedy
against ex-
ecutor by
distress:

judgment
cannot be
entered on
warrant of
attorney or

(*t*) *Horsam v. Target*, 1 Ventr. 113; S. C. 1 Lev. 306; Com. Dig. Attachment, D.

(*u*) 1 Ventr. 112; 1 Lev. 306.

(*x*) *Scurra v. Merciall*, 1 Roll. Abr. 551, tit. Customs de London, E. pl. 2; *Wood v. Smith*, Noy, 115; *Chamberlain v. Chamberlain*, 1 Chanc. Cas. 257; Com. Dig. Attachment, D.

(*y*) *Redhead v. Welton*, 29 Beav. 521. Proceedings by attachment, commenced after the death of the defendant, are null and void. *Matthey v. Wiseman*, 34 L. J. C. P. 216.

(*z*) Wentw. Off. Ex. 291, 14th ed.; *Braithwaite v. Cooksey*, 1 H. Bl. 465.

(*a*) Wentw. *ubi supra*.

(*b*) 1 H. Bl. 465. [A distress for the non-payment of a tax cannot be made after the death of the person on whom the

tax is assessed. *Wilson v. Shearer*, 9 Met. 504, 506. Shaw C. J. in this case said:

"In the analogous case of an executor it has been held that the property left by the deceased debtor cannot be levied upon after his decease. *Jewett v. Smith*, 12 Mass. 309. The reason seems to be equally strong in case of a tax warrant, which is in the nature of an execution. The debtor has ceased to have any property in the goods, and the property vests in his administrator, by relation, from the time of the intestate's death."]

(*c*) See *ante*, 906; Tidd, 551, 9th ed.

(*d*) Tidd, 561, 9th ed.; *Harden v. Forsyth*, 1 Q. B. 177. It will make no difference that the defendant, by the memorandum on the warrant, agreed for himself and his executor that it should be lawful

cognovit
given by
testator.

However, formerly, if the defendant died in vacation, within * a year after giving the warrant of attorney, judgment might be entered up, of course, at any time after, in that vacation. (e) But now by rule 56, Rules H. T. 1853, "all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day. But that it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*." (f) So a cognovit *actionem* is revoked by the death of the party. (g)

Proceeding
against
executor
on refer-
ence to ar-
bitration
by testator.

There has already been occasion to consider, in cases of arbitration, the effect of the death of either party, before or after the making of the award. (h) It may here be observed, that the court will not grant an attachment against an executor for the non-performance of an award, which was made under a reference by rule of court entered into by the testator. (i)

Liability of
executor to
pay an at-
torney's
bill after
taxation.

If an attorney's or solicitor's bill against the testator should be referred to taxation after his death, questions of difficulty may arise as to the effect of the order for payment by the executor or administrator of the sum found due. In cases where justice requires that the order for taxation should be made, and it nevertheless appears probable that, by reason of deficiency of assets, or the like, payment of the amount found to be due ought not to be made without further investigation, the court or judge by whom the order for taxation is made, ought, it should seem, to abstain from adding the usual order for payment or the delivery up of deeds. (k)

Proceed-
ings
against ex-

* If, when a bill of exchange becomes due, and is dishonored, the drawer or indorser is dead, notice of the dishonor ought to be given to his personal representative. (l)

to enter up judgment at any time, notwithstanding he should be dead. *Heath v. Brindley*, 2 Ad. & El. 365.

(e) *Ib.*; *ante*, 907.

(f) See, as to the construction of this proviso, *ante*, 895.

(g) See *Chitty's Archbold*, 883, *Prentice's ed.*

(h) *Ante*, 907, 908.

(i) *Newton v. Walker*, *Willes*, 315.

(k) See *In re Dalby*, 8 *Beav.* 469.

(l) *Chitty on Bills*, 369, 8th ed.; *Roscoe on Bills*, 199; *Byles on Bills*, 216, 5th ed. [Even before he is qualified for the active duties of his office. *Shoenberger v. Lancaster Savings Institution*, 28 *Penn. St.* 459.] In America it has been held that where the indorser of a note is dead

Where the drawee, acceptor, or maker, is dead, the bill or note must be presented to his executors or administrators, (*m*) unless where the bill is made payable and is presented at a particular place, in which case it is not necessary to present it also at the house of the executor or administrator. (*n*) In case there is no representative, the holder should demand payment at the house of the deceased. (*o*) If the holder of a bill makes the acceptor his executor, and dies, this discharge of the debt, by making the debtor executor, (*p*) will operate as a discharge of the drawer and prior indorsers. (*q*)

Executors of parties or bills of exchange.

Where an injunction had issued against the defendants in an equity suit, restraining them from disposing of the estate of their testator, the court of exchequer refused to stay proceedings against them in an action in which the debt was not admitted, observing that the injunction might be a ground for applying to stay execution. (*r*)

Effect of injunction.

A verdict against a testator or intestate may be produced in evidence against his executor or administrator, and binds him. (*s*)

Verdict against testator evidence against executor.

at the time it becomes due, and there are executors or administrators at that time known to the holder, notice must be given them; but that if there are no personal representatives at the time, a notice sent to the residence of his family is sufficient, and that it is not necessary afterwards to give notice to executors or administrators, subsequently becoming such. *Merchant's Bank v. Birch*, 17 Johns. R. 25; *Bayley*, 418; *Amer. ed. Roscoe on Bills*, note (44); [*Stewart v. Eden*, 2 Caines, 121; *Massachusetts Bank v. Oliver*, 10 Cush. 567; *Beals v. Peck*, 12 Barb. 245; *Mathewson v. Strafford Bank*, 45 N. H. 104, 107; *Rand v. Hubbard*, 4 Met. 252; *Oriental Bank v. Blake*, 22 Pick. 206. But if the notice is sent to a place where the deceased did not reside, it will be sufficient. *Willis v. Green*, 5 Hill, 232.]

(*m*) *Roscoe on Bills*, 147. [It was held in *Hale v. Burr*, 12 Mass. 86, that where the maker of a promissory note dies, and an administrator is appointed before the note falls due, a demand upon the admin-

istrator is not necessary in order to charge the indorser, unless the maturity of the note happens more than a year after the appointment of the administrator; and the reason is that by the law of Massachusetts no executor or administrator is held to answer to the suit of any creditor of the testator or intestate, if brought within one year from the appointment of the executor or administrator, unless, &c. *Oriental Bank v. Blake*, 22 Pick. 207, 208.]

(*n*) *Philpott v. Bryant*, 3 C. & P. 224.

(*o*) *Roscoe on Bills*, 147.

(*p*) See *ante*, 1312.

(*q*) *Chitty on Bills*, 569, 8th ed.; *Roscoe on Bills*, 81.

(*r*) *Davis v. Salter*, 2 Cr. & Jerv. 466.

(*s*) *R. v. Hebden*, Andr. 389; *Rosc. Ev.* 100, 2d ed. See *Smith v. Smith*, 3 Bing. N. C. 29, as to the admissibility of the declarations of the deceased, as evidence against the executor or administrator. See, also, *Spiers v. Morris*, 9 Bing. 687, as to the admissibility of entries made by a deceased executor against his interest.

* In an action against executors for money had and received by their testator, the plaintiff relied on an admission of the testator contained in his will. Notice had been given to the defendants to produce the probate, but no evidence was given to prove that the probate was in their possession. An officer of the spiritual court produced a document purporting to be the original will of the deceased, bearing the seal of the court, and also an indorsement, made by the officer of the spiritual court, purporting that probate had been granted to the defendants on that instrument as of the will of the deceased, and that they had made oath of the value of the effects accordingly. It was objected, on the part of the defendant, that the will should have been proved by one of the subscribing witnesses, and further, that probate not being produced, the next best evidence was the act of the spiritual court, which was not produced. But it was held that the document produced must be taken as proving that the defendants had obtained probate of the paper, and had therefore treated it as the will of their testator, and consequently that it ought to be received against them, at all events, as secondary, if not as original, evidence. (t)

(t) *Gorton v. Dyson*, 1 Brod. & Bing. 219. See *ante*, 1945. See, also, *ante*, 1889.

* CHAPTER THE SECOND.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN EQUITY.

AN executor or administrator is liable, in his representative character, to all equitable demands, with regard to personal property, which existed against the deceased at the time of his death. (a)

What suits in equity may be brought against executors, &c.

Again, executors and administrators are, in almost every respect, considered, in courts of equity, as trustees. Upon this principle, those courts exercise a jurisdiction over them, in the administration of assets, by compelling them, in the due execution of their trust, to apply the property to the payment of debts and legacies, and the surplus, according to the will, or, in case of intestacy, according to the statute of distributions. (b)

Hence, a court of equity will entertain a bill, or make an order, for payment of a personal legacy ; (b¹) or for the distribution of an

(a) Toller, 479.

(b) Adair v. Shaw, 1 Sch. & Lef. 262. Other auxiliary grounds of jurisdiction also exist; such as the necessity of taking accounts and compelling a discovery, and the consideration that the remedy at law, when it exists, is not plain, adequate, and complete. See Story's Eq. Jur. c. ix. § 534; [Walker v. Cheever, 35 N. H. 339; Parsons v. Parsons, 9 N. H. 309; ante, 1036, note (e). In North Carolina the probate judge alone, in administrations granted since July 1, 1869, has jurisdiction to compel the administrator to a settlement and to state his account, and apportion the assets among the creditors. But every action brought in the probate court to recover a debt against an administrator is necessarily a creditor's bill, as all the creditors must be brought in and

their claims ascertained before any judgment for the payment of any one can be given. That court also has power, upon a deficiency of assets, to order a sale of the lands. Ballard v. Kilpatrick, 71 N. Car. 281, 282; Pelletier v. Saunders, 67 N. Car. 261. So in that state the probate court has general jurisdiction of actions to recover legacies. Bell v. King, 70 N. Car. 330; Bidwell v. King, 71 N. Car. 287. The action must be brought against the executor in the probate court of the county in which the will was proved. Stanly v. Mason, 69 N. Car. 1; Foy v. Morehead, 69 N. Car. 512; Bidwell v. King, 71 N. Car. 287. As to the remedy in that state to recover a distributive share of an estate, see Williams v. Williams, 71 N. Car. 427.]

(b¹) [Ante, 1931, note (k¹).]

intestate's personal estate; (c) and will compel an executor or administrator, in the same manner as it does an express trustee, to discover and set forth an account of the assets, and of his application of them. (d) And even in a case where the testator directed that the executor should *not be compelled by law to declare the amount of a residue bequeathed to him, the court directed an account against him. (e) So an account has been decreed of an intestate's personal estate, notwithstanding an account before taken, and a distribution decreed, in the spiritual court. (f) And a bill may be brought for the discovery of assets, before the will is proved, or during the litigation thereof in the probate court. (g)

(c) Com. Dig. Chancery, 3 D. 1; Howard v. Howard, 1 Vern. 134; [Crann v. Green, 6 Ham. 542; ante, 1933, note (o).]

(d) [See ante, 1901, note (f), and cases cited.] In Brooks v. Oliver, Ambl. 406, the acting executor, to whom the produce of an estate in Antigua, belonging to an infant, was consigned, was directed to account annually by affidavit. [A bill in equity may be sustained for an account between executors, or between a surviving executor and the administrator of a deceased executor. Stiver v. Stiver, 8 Ham. 217.]

(e) Gibbons v. Dawley, 2 Chanc. Cas. 198. But the rule of the court of chancery has always been that the plaintiff must aver and prove at least one act of wilful neglect or default in order to obtain a decree directing an inquiry as to wilful neglect or default; nor will the court direct a preliminary inquiry unless the fact of wilful neglect or default can be treated as in issue between the parties, or unless, if in issue, there is evidence upon it. Sleight v. Lawson, 3 Kay & J. 292; Coope v. Carter, 2 De G., M. & G. 292. It is not sufficient ground for an inquiry that a general allegation that there are outstanding assets, without specifying particulars, is not met by a distinct denial. Massey v. Massey, 2 Johns. & H. 728. [See Ashburn v. Ashburn, 16 Geo. 213.]

(f) Bissell v. Axtell, 2 Vern. 47. [On

a bill against an administrator for the discovery of assets, he may show that he has fully administered, notwithstanding a judgment at law against him, admitting assets. Bedell v. Keethley, 5 T. B. Mon. 598.]

(g) Dulwich College v. Johnson, 2 Vern. 49; Phipps v. Steward, 1 Atk. 285; ante, 308; [1901, note (f)]. In some of the American States the business of administering upon the estates of persons deceased is transacted in courts of probate, or other courts of like jurisdiction, independent of courts of equity. These courts of probate are generally clothed with ample authority for conducting all the ordinary proceedings in the settlement and disposition of such estates. In New Hampshire, in the case of Walker v. Cheever, 35 N. H. 345, Eastman J. said: "Under the English practice, courts of equity assume a very general jurisdiction over cases of administration, from the fact that the courts of common law and ecclesiastical courts in that country are held not to have powers adequate to give effectual relief. This jurisdiction is said to have been founded upon the principle that it is the duty of the court to enforce the execution of trusts. But it has been also said that other grounds exist, such as the necessity of taking accounts and compelling a discovery. With us there is no necessity for assuming any such general jurisdiction in equity upon this subject. Our

A single creditor may sue in equity for his demand out of the personal assets, and may, as at law, gain a preference by the judgment in his favor, over other creditors in the same degree, who

statutes providing for the settlement and distribution of estates, in most cases, give ample powers to the courts of probate and of common law to enforce all needful remedies to secure the rights of all parties, and so far as the statutes may apply in the settlement of estates, they take from chancery its jurisdiction." See *Parsons v. Parsons*, 9 N. H. 309. In Massachusetts it was decided, in the case of *Morgan v. Rotch*, 97 Mass. 396, that an executor, who has not settled a final account in the probate court, is not liable to be charged by suit in equity, by the residuary legatees, for property sold by him in violation of his trust, although all the dispositions of the will prior to the residuary clause have been satisfied. The rule laid down and followed in this case, as in *Wilson v. Leishman*, 12 Met. 316, is that the remedy in such cases is not to be sought in a court of equity, so long as plain, adequate, and complete relief can be obtained in the probate court. In *Morgan v. Rotch*, 97 Mass. 399, Foster J. said: "A very different case from the present would be presented if the executor's account had been finally settled in ignorance of the improper character of the sale. Then, perhaps, a court of equity, if the remedy in the probate court were lost, might enforce a trust and order a new sale by the executor, or afford other appropriate relief to enable the parties beneficially interested in the estate to realize the full value of the property." In some states courts of equity have interfered in the settlement of estates of persons deceased, on occasions of difficulty, and in aid of the courts of probate. See *Pharis v. Leachman*, 20 Ala. 662; *Stewart v. Stewart*, 31 Ala. 207; *Ledyard v. Johnston*, 16 Ala. 548; *Hagan v. Walker*, 14 How. (U. S.) 29; *Freeland v. Dazey*, 25 Ill. 294; *Adams v. Adams*, 22 Vt. 50; *Morse v. Slason*, 13 Vt. 296; *West v. Bank of Rutland*, 19 Vt. 403; *Gaines v. Chew*, 2 How. (U. S.) 619; *Parsons v.*

Parsons, 9 N. H. 309; *Beattie v. Abercrombie*, 18 Ala. 9; *Walker v. Cheever*, 35 N. H. 339; 1 Story Eq. Jur. § 543 a. In some of the American States courts of equity seem to have assumed to some extent a concurrent jurisdiction with the courts of probate in matters connected with the settlement of estates. In *Gould v. Hayes*, 19 Ala. 438, it was held that the original jurisdiction of equity is not affected by the statutory jurisdiction conferred on the orphan's court, and similar tribunals, except where there are prohibitory or other restrictive words. See *Freeland v. Dazey*, 25 Ill. 294; *Seymour v. Seymour*, 4 John. Ch. 409; *Van Mater v. Sickler*, 1 Stockt. 483; *Clarke v. Johnston*, 2 Stockt. 287; *Fleming v. McKesson*, 3 Jones Eq. 316; *Colbert v. Daniel*, 32 Ala. 329; *Morse v. Slason*, 13 Vt. 296; S. C. 16 Vt. 319; *Trescott v. Trescott*, 1 McCord Ch. 417. In a suit by bill in equity by the administrators with the will annexed of the estate of the deceased in Rhode Island, to obtain the advice of the court in relation to the construction of the will and the operation and effect of the Rhode Island statute of wills and canons of descent, under the circumstances stated in the bill, for the purpose of aiding the court of probate to a correct decree of distribution, it was held that the supreme court has the power to proceed to the final settlement and distribution of estates of deceased persons when the fund and the parties are before it—its decrees will bind all parties who have been properly notified, either by personal or substituted service—and the court will exonerate executors and administrators for payments made according to its decree. *Daboll v. Field*, 9 R. I. 266, 285, 286. Potter J. in this case said: "It is contended by the administrators, that this court has no jurisdiction to settle accounts and decree distribution, because that is in the exclusive jurisdiction

may not have used equal diligence. (*h*) But a person entitled to a share of a sum of money, which is due as a debt from the testator, cannot maintain a bill for his own share, unless he sues on behalf of himself and all other parties interested in the debt, or makes those other persons parties to the suit. (*i*)

The usual course, before the passing of 15 & 16 Vict. c. 86, (*k*) was for one or more creditors to file a bill (commonly called a creditors' bill), by and on behalf of him or themselves, and all other creditors who should come in under the decree, for an account of the assets and a due settlement of the estate. For in order to prevent inconvenient * preference in the administration of assets, as well as to avoid the burden which several suits by several creditors could not fail to bring on the fund to be administered, a court of equity always allowed a creditor to sue on behalf of himself and the other creditors of the deceased, and has thereupon directed a general account of the estate and debts to be taken against the executor or administrator, (*l*) or, if assets were admitted, and the debt admitted or proved, has made an immediate decree for payment. (*m*)

Upon the same principle a legatee has always been permitted to sue on behalf of himself and other legatees; and, even under the old practice, a bill has been admitted by a person claiming under a general description on behalf of himself and the other persons equally entitled under the same description. (*n*)

But although it has been the practice of the court in cases of this kind to entertain suits by creditors, legatees, and parties entitled in distribution on behalf of themselves and all others, and to

of the court of probate." "Before the supreme court had equity powers, the jurisdiction of the court of probate was indeed exclusive, because there was no other court which had any power over matters of this kind. But since full equity jurisdiction was conferred upon this court, it has power, when a proper bill is filed, and it has the fund and the parties before it, to proceed to a final settlement and distribution, if the nature of the case renders it proper."]

(*h*) See *ante*, 1035; Mitf. Pl. 166, 167, 4th ed. See Atty. Gen. v. Cornthwaite, 2 Cox, 44; [McCoy v. Green, 3 John. Ch. 58.]

(*i*) Alexander v. Mullins, 2 Russ. & My. 568.

(*k*) See *post*, 2008.

(*l*) Mitf. Pl. 166, 4th ed. A creditor having *debitum in presenti solvendum in futuro* may maintain such a suit. Whitmore v. Oxborrow, 2 Y. & Coll. C. C. 13. And so may a claimant under a voluntary covenant. Watson v. Parker, 6 Beav. 283, note (*n*). After a decree in the suit, the executor cannot do any act to affect the relative rights of creditors. By Sir John Leach M. R. in Shewen v. Vandenhorst, 2 Russ. & My. 75; 1 Russ. & My. 347, S. C.

(*m*) Woodgate v. Field, 2 Hare, 211.

(*n*) Mitf. Plead. 169, 4th ed.

exonerate the executor or administrator for payment of assets pursuant to its decree, yet it is not to be understood that such a decree is absolutely binding upon the absent creditors, legatees, or distributees, who have had no opportunity of proving and presenting their claims, (*o*) and have been guilty of no laches, (*p*) so that they are entitled to no redress, but are to be deemed concluded. On the contrary, although they have no remedy against the executor or administrator, yet they have a right to assert their claim * against the creditors, legatees, or distributees who have received it. (*q*)

It is, however, no longer necessary for creditors and other parties interested to file a bill or claim, for the purpose of enforcing their claims upon the *personal* estate of a deceased. For by stat. 15 & 16 Vict. c. 86, s. 45, it is enacted that "it shall be lawful for any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, or the next of kin, or some or one of the next of kin, of a deceased person, to apply for and obtain as of course, without bill or claim filed, or any other preliminary proceedings, a summons (*r*) from the master of the rolls, or any of the vice chancellors, requiring the executor or administrator, as the case may be, of such deceased person, to attend before him at chambers, for the purpose of showing cause why an order for the administration of the personal estate of the deceased should not be granted; and upon proof by affidavit of the due service of such summons, or on the appearance in person, or by his solicitor or counsel, of such executor or administrator, and upon proof by affidavit of such other matters, if any, as such judge shall require, it shall be lawful for such judge, if in his discretion he shall think fit so to do, to make the usual order (*s*) for the administration of

Stat. 15 &
16 Vict. c.
86, sect.
45, cred-
itor, &c.
may ob-
tain an
order for
the admin-
istration of
the per-
sonal es-
tate:

(*o*) *David v. Frowd*, 1 My. & K. 200. See *Anon.* 9 Price, 210.

(*p*) *Sawyer v. Brichmore*, 1 Keen, 391; 2 My. & Cr. 211. See, also, *Cattel v. Simons*, 8 Beav. 143.

(*q*) *Story on Equity Plead.* ch. iv. s. 106; *ante*, 1450, 1451.

(*r*) But the case must be a simple case of administration. *Acaster v. Anderson*, 19 Beav. 161; *Rump v. Greenhill*, 20 Beav. 512; *Smite v. Spilsbury*, 1 Dr. & Sm. 151. The summons may be in a form similar

to the form set forth in Schedule (K) to the Orders, with such variations as the circumstances of the case may require. Cons. Orders, xxxv. 3. The court has no authority under Cons. Orders, x. 7, to order the service abroad of an administration summons. *Lester v. Bond*, 1 Dr. & Sm. 392.

(*s*) The only decree which can be made upon summons under this section is the usual decree, i. e. a decree that the executor or administrator shall account for the

the estate of the * deceased, with such variations, if any, as the circumstances of the case may require; and the order so made shall have the force and effect of a decree to the like effect made on the hearing of a cause or claim between the same parties; provided that such judge shall have full discretionary power to grant or refuse such order, or to give any special directions touching the carriage or execution of such order, and in the case of applications for any such order by two or more different persons or classes of persons, to grant the same to such one or more of the claimants, or of the classes of claimants, as he may think fit, and if the judge shall think proper, the carriage of the order may subsequently be given to such party interested and upon such terms as the judge may direct." (t)

By sect. 47 of the same statute it is provided that creditors, &c. and of real estate devised for sale, may obtain a similar order for the administration of the real estate of the deceased person, where the whole of such real estate is by devise vested in trustees who are by the will empowered to sell the same. (u)

Under this enactment it was still necessary to file a bill or claim, where the object sought was the administration of the real estate, if not devised in trust for sale. However, by 22 & 23 Vict. c. 35, s. 14, the devisee in trust is empowered * to raise money by sale, notwithstanding want of express power in the will, where the real estate or any specific portion thereof is charged with the payment of debts, or with the payment of any legacy, or other specific sum of money; and it is presumed

personal estate which has been received by him, and it confers no jurisdiction to make on summons in chambers a decree that he shall account for what without his wilful neglect or default he might have received, or to make him accountable for any misconduct. And it matters not whether the usual decree was made upon bill or summons. If in the process of investigating the accounts under the usual decree the plaintiff discovers that the defendant has been guilty of wilful neglect or default in getting the assets or other misconduct, his remedy is by filing (with the leave of the court) a supplemental bill adapted to the purpose, which is to all intents and purposes a bill of revivor.

Partington v. Reynolds, 4 Drew. 253. See, also, Smith v. Spilsbury, 1 Dr. & Sm. 151.

(t) An order is as conclusive as a decree against parties neglecting to come in and prove their claims under it. Cons. Orders, xxxv. 12. And the proceedings under it are precisely similar to those under a decree. For proceedings at chambers generally, see Cons. Orders, xxxv.

(u) See De la Salle v. Moorat, L. R. 11 Eq. Ca. 8. A creditor cannot have a decree for the administration of the real estate unless he sues on behalf of all creditors. Ponsford v. Hartley, 2 Johns. & H. 736.

that in all such cases creditors may now avail themselves of the provisions of 15 & 16 Vict. c. 86, s. 47, and obtain an order for the administration of the real estate.

By the 1st rule of sect. 42 it is enacted, that "any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person." (*u*¹)

Residuary legatees and next of kin may have a decree for the administration of personal estate, without service on the rest:

This places residuary legatees and next of kin upon the same footing with specific pecuniary legatees in respect of the manner of enforcing their claims against the personal estate of the deceased. (*v*)

By the 2d rule of the same section, "any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person."

so of a legatee of legacy charged on real estate.

After the usual decree, every creditor has an interest in the suit, (*x*) and is, in a sense, deemed to be before the court; yet, until decree, the plaintiff, it should seem, is *dominus litis*, so that he may deal with the suit as he pleases; and he may settle the matter with the executor, by * the latter paying the debt and costs of the suit, and compromise the suit, and relinquish proceedings. (*y*) And indeed the court will compel the creditor to accept payment of his debt, when the executor offers to pay it with the costs of the suit. (*z*)

Until decree the plaintiff is *dominus litis*.

(*u*¹) [See *Matter of Kirkpatrick*, 22 N. J. Eq. 463. When the residuary legatee is a corporation aggregate, and the executor named in the will dies before the testator, administration will be granted to a member of the corporation named by them for the purpose. *Matter of Kirkpatrick*, *supra*.]

(*v*) As to the necessity of revivor upon the death of a co-plaintiff residuary legatee since this rule, see *Hinde v. Morton*, 2 Hemm. & M. 368, and the cases there cited.

(*x*) See *Sterndale v. Hankinson*, 1 Sim. 399, 400; *Cook v. Bolton*, 5 Russ. 282;

Brown v. Lake, 2 Coll. 620; *Smith v. Guy*, 2 Phill. C. C. 159. It would appear that under the old practice only creditors whose debts were due at the death of the testator were in strictness permitted to come in under the decree; the present practice is to admit all creditors to come in whose debts have become due before the date of the report. *Thomas v. Griffith*, 2 De G., F. & J. 555, per Turner L. J.

(*y*) 2 Hare, 213; *Wood v. Westall*, 1 Younge, 305.

(*z*) 2 Hare, 213; *Pemberton v. Topham*, 1 Beav. 316; *Holden v. Kynaston*, 2 Beav. 204.

It may be further remarked, that there is nothing to prevent other creditors from instituting suits for the like purpose; and as it is possible that, before the decree, the litigating creditor may stop his suit, the court permits them to go on together until a decree in one of them is obtained. (a) So, also, in the case of several persons claiming under the same general description. And when the usual decree has been obtained in one of such suits, if another suit is instituted, praying no further relief than might be had in the former suit, the parties to such former suit ought to apply to have the proceedings in the latter suit stayed; otherwise the costs of it may be dealt with as costs in their suit. (b) On the application to stay the proceedings, the question is, whether the suit which is sought to be stayed asks something more than could be obtained under the existing decree. (c)

* The 45th sect. of 15 & 16 Vict. c. 86, stated above, (d) gives authority to the judge to deal, as he may think fit, with applications for an administration order by different persons or classes of persons.

Executor,
&c. liable
to be sued
for testa-
tor's debts
from mo-
ment of
death.

It must be observed that, although an executor has a year allowed him in equity to pay legacies, yet that does not extend to debts, but he is liable to be sued the moment after the testator's death. (e)

(a) 2 Hare, 214. As to staying proceedings in the other suits, see *Hawkes v. Barrett*, 5 Madd. 17; *Turner v. Dorgan*, 12 Sim. 504; *Reid v. Territt*, 1 Coll. 1; *Dryden v. Foster*, 6 Beav. 146; *Frowd v. Baker*, 4 Beav. 76; *Portarlington v. Damer*, 2 Phill. C. C. 262; *Duffort v. Arrow-smith*, 7 De G., M. & G. 434; *Harris v. Gandy*, 1 De G., F. & J. 13.

(b) *Therry v. Henderson*, 1 Y. & Coll. C. C. 481.

(c) *Rigby v. Strangways*, 2 Phill. C. C. 175; *Rump v. Greenhill*, 20 Beav. 512. Where two decrees had been made for the administration of the estate of the deceased, one in a creditors' suit, and the other in a legatees' suit, *Shadwell V. C.* refused a motion by the plaintiff in the former to stay the prosecution of the decree in the latter, so far as it directed an account of the deceased's estate and of his debts, there being no suggestion of a de-

ficiency of assets. *Plunkett v. Lewis*, 11 Sim. 379. See, also, *Suisse v. Lord Lowther*, 2 Hare, 424. In *Gwyer v. Peterson*, 26 Beav. 83, the common administration decree having been made in a suit by one of the next of kin, a second suit was instituted six months afterwards by another next of kin praying additional relief. The court stayed the second suit on defendant in the first undertaking not to object to any additions which the judge at chambers might think reasonable. *Hoskins v. Campbell*, 2 Hemm. & M. 42; *Belcher v. Belcher*, 2 Dr. & Sm. 444, in which case *Kindersley V. C.* expressed his strong disapprobation of the practice of instituting a second suit where there was already an existing suit properly constituted for the same purpose.

(d) *Ante*, 2008.

(e) *Nicholls v. Judson*, 2 Atk. 301. [In Massachusetts, and other states, no execu-

A debtor to a testator cannot maintain a bill against the personal representative, to obtain the directions of the court as to the disposal of the money due by him, and to restrain an action, brought by the personal representative to recover the debt, on the ground that the debt has been appropriated by the testator for a particular purpose, and that the personal representative intends to apply it for purposes not warranted by the will. (*f*)

Bill against executor by testator's debtor to restrain action on ground of intended misappropriation of the fund not maintainable.

If letters of administration be granted to an infant, under which he receives and disposes of assets of the intestate, an account cannot be directed in respect of his receipts during his infancy. (*g*)

No account of receipts by infant administrator.

If, pending a suit, the defendant dies, it shall be continued by an order of revivor against his executor or administrator, whether before or after decree, and whether or not an admission of assets is sought; (*h*) but where a defendant dies * before appearance the suit cannot be revived against his representatives. (*i*)

Order of revivor.

If a decree be obtained against an executor for payment of a debt of his testator, and costs, out of the assets, and the executor dies, and his representative does not become the representative of the testator, the suit may be revived against the representative of the testator, (*k*) and the assets of the testator may be pursued in his hands, without reviving against the representative of the original defendant. (*l*)

The general rule is, that if there are several executors or admin-

tor or administrator can be held to answer to the suit of any creditor of the deceased within one year after he has given bond. Genl. Sts. Mass. c. 97, § 16; *ante*, 1946, note (*u*¹). See *Butts v. Genung*, 5 Paige, 254; *Daniel v. Lehre*, 2 Strobb. Eq. 83; *Womack v. Greenwood*, 6 Geo. 299.]

(*f*) *Darthez v. Winter*, 2 Sim. & Stu. 536.

(*g*) *Hindmarsh v. Southgate*, 3 Russ. 324.

(*h*) *Dean of Ely v. Edwards*, 22 L. J. 629; *Edwards v. Batley*, 19 Beav. 457; *Cartwright v. Shephard*, 20 Beav. 112.

[But a suit pending cannot, on the death of the defendant, be continued against an

executor *de son tort*. *Irwin v. Sterling*, 27 Geo. 563.] As to length of time after which a revivor will be allowed, see *Bland v. Davison*, 21 Beav. 312; *Alsop v. Bell*, 24 Beav. 451. A solicitor having died pending an order for taxation, it was held that the proceedings might be revived by the client, and the solicitor's representatives by an *ex parte* order. *Re Nicholson*, 29 Beav. 665; *Re Waugh*, *Ib.* 666.

(*i*) *Bland v. Davison*, 21 Beav. 312. [See *Hyde v. Leavitt*, 2 Taylor, 175; *Clindenin v. Allen*, 4 N. H. 385; *ante*, 1883, note (*q*¹).]

(*k*) *Mitf. Pl.* 78, 4th ed.

(*l*) *Adair v. Shaw*, 1 Sch. & Lef. 262.

istrators, they must all be sued, though some of them be infants. (*m*)

Parties : Therefore, a person cannot, either as creditor or residuary legatee, bring a bill in equity against one co-executor only. (*n*) But it is only necessary to sue so many of the executors or administrators as have acted; for this is sufficient in law, (*o*) and much more in a court of equity. (*p*) Where an executor in trust was outlawed, and a witness proved that he had inquired after, and could not find him, it was held that it was not necessary to make him a party. (*q*)

* If a bill is filed against a married woman, executrix or administratrix, her husband must also be a party, unless he is an exile, or has abjured the realm. (*r*) Hence, in *Taylor v. Allen*, (*s*) Lord Hardwicke granted an injunction to restrain a wife, executrix, from getting in the assets, her husband being in the West Indies, and not amenable to the process of the court, on the ground, that if she wasted the assets, or refused to pay, a creditor could have no remedy, inasmuch as her husband must be joined as a party to the suit against her.

If a bill is brought against an executor, during whose infancy the will appointed an executor *durante minore ætate*, the latter must be made a party, unless the former has received all the testator's personal estate from the hands of the temporary executor, upon an account between them. (*t*)

It seems to be now established, that in a suit for an account of the assets of a deceased person, the personal representative of his former representative is properly joined as a co-defendant with his continuing or present personal representative. (*t*¹) Accordingly, in *Holland v. Prior*, (*u*)

in what cases it is necessary to make the executor, &c. a party:

(*m*) 16 Vin. Abr. 251, tit. Party, B. pl. 75; *Strickland v. Strickland*, 12 Sim. 463; 20; [*Clements v. Kellogg*, 1 Ala. 330; *Dyson v. Morris*, 1 Hare, 413. *Bregaw v. Claw*, 4 John. Ch. 116; *Brotten v. Bateman*, 2 Dev. Eq. 115.]

(*n*) *Scurry v. Morse*, 9 Mod. 89. In a case where a bill had been filed for an account of the testator's estate, and it was objected that one of the executors was not a party, he was ordered to be introduced into the decree then made, as a party, and ordered to account before the master, without putting off the cause to add parties. *Pitt v. Brewster*, Dick. 37.

(*o*) See *ante*, 1935.

(*p*) *Brown v. Pittman* Gilb. Eq. Rep.

(*q*) *Heath v. Percival*, 1 P. Wms. 684. An administrator, though insolvent, must be made a party to a bill for a discovery of assets. *Ashurst v. Eyre*, 2 Atk. 51. So although he actually releases, he must be a party to the suit. *Smithby v. Hinton*, 1 Vern. 31.

(*r*) Mitf. Pl. 30, 4th ed.

(*s*) 2 Atk. 213.

(*t*) *Glass v. Oxenham*, 2 Atk. 121.

(*t*¹) [*Sortore v. Scott*, 6 Lansing, 276, 277.]

(*u*) 1 My. & K. 237.

it was held by Lord Brougham, overruling the decision of Sir L. Shadwell V. C., that the executor of an administratrix, who had received assets of her intestate, might and ought to be made a defendant in a suit instituted by a creditor of the intestate. (x) But in *Masters v. Barnes*, (y) Knight Bruce * V. C. held that it was not, in all cases, *necessary*, in an administration suit against a surviving executor, to bring before the court the representative of the deceased executor. However, subsequently, in *Hall v. Austin*, (a) his honor appears to have ultimately acceded to the proposition that, as a general rule, where there are several executors who have acted and one of them dies before any suit is instituted, a person interested in the administration of the estate cannot file a bill for the general administration of the estate, making the surviving executors alone parties.

The law, in this respect, has not been altered by the 32d order of August, 1841 (Cons. Orders, VII. 2) ; for it has been held (b)

(x) In *Phelps v. Sproule*; 4 Sim. 321, A. died, having made B. his executor, who, without proving A.'s will, possessed part of his assets. B. died and made C. his executrix, who proved his will and took out administration to A. A bill was filed against C. for an account of A.'s assets possessed by her and by B. Afterwards C. died, having made D. her executor, and E. took out administration to A. The plaintiff filed a bill of revivor and supplement against D. and E. to which D. demurred. And the demurrer was allowed by Shadwell V. C. on the ground that there was not that continued chain of representation which could justify a bill of revivor against D. But this case was questioned by Lord Brougham in *Holland v. Prior*, and by Knight Bruce V. C. in *Masters v. Barnes*.

(y) 2 Y. & Coll. C. C. 616.

(a) 2 Coll. 570.

(b) *Biggs v. Penn*, 4 Hare, 469 ; *Hall v. Austin*, 2 Coll. 570. See, also, *Penny v. Penny*, 9 Hare, 39. By this order, in all cases in which the plaintiff has a joint and several demand against several persons, either as principal or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such

demand all the persons liable thereto ; but the plaintiff may proceed against one or more of the persons severally liable. Lord Langdale has several times decided that this order applies to a breach of trust, and consequently that if several executors or trustees have committed a breach of trust, they may be sued severally. *Perry v. Knott*, 5 Beav. 293 ; *Kellaway v. Johnson*, 5 Beav. 319. And Knight Bruce V. C. seems to have felt himself bound by these decisions. 2 Coll. 574. See, also, *Strong v. Strong*, 18 Beav. 408. But Wigram V. C. in *Shipton v. Rawlins*, 4 Hare, 619, 623, said he thought Lord Langdale did not intend to lay it down as a universal proposition, that wherever a state of circumstances existed which might constitute a breach of trust, if a loss were incurred, the *cestui que trust* can arbitrarily select any one trustee and charge him as for a breach of trust, whatever the nature of his complaint might be. And his honor proceeded to observe that the case of *Walker v. Symonds*, 3 Swanst. 75, as explained in *Munch v. Cockerell*, 8 Sim. 231, shows that all trustees are *prima facie* necessary parties to a suit complaining of a breach of trust, although execution might be taken out against one only. *Macgachen*

that this order does not apply to the case of a general administration suit.

There has already been occasion (*c*) to point out the *necessity of making the personal representative a party to a suit by a claimant on the real estate, or other fund of a deceased debtor entitled to exoneration by the personal assets. And it may be stated as a general rule, that wherever the personal assets of a deceased person may be affected by the decree, his personal representative must be a party to the suit. (*d*)

Likewise, it is clearly established that an estate cannot be administered in a court of equity in the absence of a personal representative. (*e*) And, consequently, if the statements of the bill demonstrate that the court cannot give the plaintiff the relief which he asks without an administration of the estate, there must be a personal representative of it before the court. (*f*) Accordingly, on a demurrer to a bill seeking payment of a legacy out of assets come to the hands of the defendant, who was the husband of the sole executrix deceased, it was held by Lord Cottenham C. that an allegation that all the testator's debts and the other legacies bequeathed by his will had been paid, and that there were assets *ultra* in the hands of the defendant to satisfy the plaintiff's demand, was not sufficient to dispense with the presence of a personal representative of the testator, the allegation being one which, even if admitted by the defendant, the court would not take his word for. (*g*)

By 15 & 16 Vict. c. 86, s. 44, it is enacted, that "if in any *suit Court may or other proceedings (*h*) before the court it shall appear proceed in any suit, to the court that any deceased person who was interested

v. Dew, 15 Beav. 84; *Devaynes v. Robinson*, 24 Beav. 86.

(*c*) *Ante*, 522.

(*d*) *Ante*, 522, 523. See, also, *Wilkinson v. Fowkes*, 9 Hare, 193; *Donald v. Bather*, 16 Beav. 26. But in a suit for an account by a surviving partner against a debtor to the firm, it is not in general necessary to make the personal representative of the deceased partner a party. *Haigh v. Gray*, 3 De G. & Sm. 741. The attorney general does not, as a party in the cause, sufficiently represent the estate of an illegitimate person who died intestate,

so as to enable the court to dispense with a legal personal representative of such person duly constituted in the ecclesiastical court as a party. *Bell v. Alexander*, 6 Hare, 543.

(*e*) *Lowry v. Fulton*, 9 Sim. 104.

(*f*) 2 Phill. C. C. 153.

(*g*) *Penny v. Watts*, 2 Phill. C. C. 149. See, further, as to parties, stat. 15 & 16 Vict. c. 86, s. 42, and Cons. Orders, VII. 1, 2.

(*h*) A special case under 13 & 14 Vict. c. 35, s. 1, is within this enactment. *Swallow v. Binns*, 9 Hare App. 47.

in the matters in question has no legal personal representative, it shall be lawful for the court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the court shall think fit, either specially or generally by public advertisements; and the order so made by the said court, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the court."

&c. without representative of deceased person, or may appoint one; stat. 15 & 16 Vict. c. 86, s. 44.

This section, however, does not apply to the case where the estate to which it is desired to appoint a representative is the estate being administered by the court, but only to cases where an individual who, when living, was interested in the suit, and was made a party, has died. Then the court may either appoint a person to represent that party, or may proceed without any representative. (i) And in *Long v. Storie*, (k) Wood V. C. said that the power was only intended to be exercised where there is a difficulty in obtaining representation owing to the insolvency of the deceased, or some such cause. (l)

* If the estate is to be administered, the executor *de son tort* being before the court will not dispense with the presence of a regular representative. He is only treated as executor for the purpose of being charged, not for any other purpose. (m)

If, indeed, an executor or administrator has so dealt with a

(i) *Silver v. Stein*, 1 Drew. 295, by Kindersley V. C.; *Maclean v. Dawson*, 27 Beav. 21; *Rogers v. Jones*, 1 Sm. & Giff. 17; *Bliss v. Putnam*, 29 Beav. 20. See, also, *Groves v. Levi*, 9 Hare App. 47.

(k) *Kay App.* 12.

(l) The person who would be appointed administrator *ad litem* is the most proper person to be nominated to represent a deceased party who has no personal representative under this section. Dean and Chapter of *Ely v. Gayford*, 16 Beav. 561

See, also, *Hele v. Lord Bexley*, 15 Beav. 340; *Fowler v. Bayldon*, 9 Hare App. 78; *Rawlins v. M'Mahon*, 1 Drew. 225; *Rogers v. Jones*, 1 Sm. & G. 17; *Rowland v. Evans*, 33 Beav. 202; *Jt. Stk. Dist. Co. v. Brown*, L. R. 8 Eq. Cas. 376. The cases on this section are fully collected in *Morgan's Chancery Acts and Orders*, 198.

(m) 2 Phill. C. C. 152; *Creasor v. Robinson*, 14 Beav. 589.

fund, that by reason of such dealing it has ceased to bear the character of a legacy or share of residue, and has assumed the character of a trust fund, in a sense different from that in which the executor or administrator held it,—if it has been taken out of the estate of the testator, and appropriated to, or made the property of, the *cestui que trust*,—it may not be necessary that the *cestui que trust* should bring before the court the personal representative of the testator in a suit to recover that part of the estate. (n)

An allegation that the defendant, being the person entitled to take out representation to the deceased, refuses to apply for it, and impedes the plaintiff in procuring a grant of it to any other person, is not a sufficient answer to a demurrer founded on the absence of such representative, (o) though it was said that it might be otherwise if the bill alleged a *lis pendens* in the ecclesiastical court. (p)

There has already been occasion to point out that in cases where the executor or administrator is required to be made a party, it is not sufficient that he is such by the appointment and authority of a foreign government; but he must obtain his right to represent the estate from the probate court in this country. (q)

* It appears to be now settled, after some contrariety of decision on the subject, (r) that where there is no general personal representative, but a special representative limited to the subject of the suit has been appointed by the probate court, and the limited administrator is made a party to the cause, the estate of the deceased is properly represented in the suit.

(n) *Bond v. Graham*, 1 Hare, 482, 484. See, also, *Arthur v. Hughes*, 4 Beav. 506, and Lord Cottenham's judgment in *Penny v. Watts*, 2 Phill. C. C. 153, 154.

(o) *Penny v. Watts*, 2 Phill. C. C. 149.

(p) *Ib.*; *ante*, 498 *et seq.*

(q) *Ante*, 361 *et seq.* See, also, 1929. In *Anderson v. Caunter*, 2 My. & K. 763, A., one of the executors of the will of B., who died in India, proved the will, and possessed the testator's assets in India. The widow and executrix of A. proved her husband's will, and possessed his assets in India, and having afterwards come

to England, she was made a party to a suit for the administration of B.'s estate. And Sir J. Leach M. R. held that it was not necessary that an administrator of A.'s estate in England should be also a party to this suit. But see the observations of Lord Cottenham on this decision, 2 My. & Cr. 110. See, also, *Story's Confli. of Laws*, c. xiii. § 513, note (1), where it is said that *Anderson v. Caunter* seems not a sound authority. *Maclean v. Dawson*, 27 Beav. 21; *Flood v. Patterson*, 29 Beav. 295.

(r) See *ante*, 523, 524.

The general rule is, that, inasmuch as the executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and has the duty cast on him of protecting it against improper demands, it is not necessary or proper to join either a pecuniary or a residuary legatee, or the next of kin, as a party to a bill against the executor or administrator for an account of the personal estate, however interested such persons may be to contest the demand which has occasioned the suit. (s) Special circumstances, however, have been permitted to justify the relaxation of this rule. (t)

who may
be made
co-defend-
ants with
executors,
&c.

Again, the established rule is, that, in ordinary cases, persons who have possessed themselves of the property of the deceased, or debtors to the estate generally, cannot be made parties to a bill against the executor. For regularly there can be no suit against the debtor but by the executor, who has the right both in law and in equity. If he even * releases, and is solvent, neither a creditor nor a residuary legatee can bring any bill against that debtor. There must be collusion or insolvency, or some special case. The court will interfere, if there be such special case; as collusion or insolvency; and then the bill may be brought against both the debtor and the executor. (u) And the general principle on which a debtor to the estate cannot be made a defendant to a bill by a creditor or residuary legatee against the executor, unless collusion, insolvency, or some special case be shown, applies equally to the case of a creditor overpaid by the executor; that is, if there is no collusion or special case, if the executor is not insolvent, he stands the middle man, responsible for the property misapplied by paying a man as a creditor who was not a

(s) *Brown v. Dowthwaite*, 1 Madd. 446; 9 Beav. 15.

(t) *Lord Hertford v. Zichi*, 9 Beav. 11.

(u) *Newland v. Champion*, 1 Ves. sen. 105; *Utterson v. Mair*, 2 Ves. jr. 95; *Doran v. Simpson*, 4 Ves. 651; *Troughton v. Binkeas*, 6 Ves. 573; *Alsager v. Rowley*, 6 Ves. 748; *Beckley v. Dorrington*, cited by Lord Eldon, *Ib.* 749; *Benfield v. Solomons*, 9 Ves. 86; *Burroughs v. Elton*, 11 Ves. 29; *Consett v. Bell*, 1 Y. & Coll. C. 569; *Lancaster v. Evors*, 4 Beav. 158; *Baddeley v. Curwen*, 2 Coll. 151; *Barker*

v. Birch, 1 De G. & Sm. 376; [*Fisher v. Hubbell*, 7 Lansing, 481; S. C. 65 Barb. 74; S. C. 1 N. Y. Sup. Ct. 97.] As to whether a refusal by the executor to sue the debtor is sufficient, see the case last cited. The special circumstances which will authorize making the debtor a party are not confined to collusion or insolvency. 1 Y. & Coll. C. C. 569; 1 De G. & Sm. 376; *Stainton v. The Carron Company*, 18 Beav. 146; *Saunders v. Druce*, 3 Drew. 140.

creditor, as in the other case for the property outstanding in a debtor. (x)

But this rule has been relaxed in the case of surviving partners of the deceased, whom it is allowable to make parties with the executor, in order, it is said, that the plaintiff may have an account of the personal estate entire. (y) Accordingly, in *Bowsher v. Watkins*, (z) it was held by Sir John Leach M. R. that residuary legatees might maintain a bill for an account against the executor and the surviving partner of the testator, although collusion between the executor and the surviving partner was neither charged * nor proved. (a) But upon the examination of the authorities (b) it will be found that there is no instance of such a suit being maintained in the absence of special circumstances, and that collusion is clearly not the only ground on which such a bill can be supported. The cases seem to go to this extent, — that such a bill may be supported in all cases where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners. (c)

It may be here observed, that although one of two executors or trustees may sue the other executor or trustee without making the *cestuis que trust* parties to the suit, yet where such *cestuis que trust* have participated in the breach of trust they are necessary parties. (d)

(x) 6 Ves. 748.

(y) 1 Ves. sen. 106, by Lord Hardwicke.

(z) 1 Russ. & My. 277.

(a) His honor, in the previous case of *Gedge v. Traill*, 1 Russ. & My. 281, note, overruled a demurrer to a creditor's bill, which had made the copartners of the deceased testator co-defendants with his executor, upon the ground that the retaining of assets by a stranger with consent of the executor, amounted to collusion. In *Davies v. Davies*, 2 Keen, 534, Lord Langdale M. R. said that the decision of *Bowsher v. Watkins* is far from establishing the general proposition, that in every case a bill may be filed against an executor and a surviving partner of the testator,

without charging and proving fraud or collusion. See, also, *Law v. Law*, 2 Coll. 41; *Cropper v. Knapman*, 2 Y. & Coll. 338.

(b) *Bowsher v. Watkins*, 1 Russ. & My. 277; *Gedge v. Traill*, 1 Russ. & My. 281; *Davies v. Davies*, 2 Keen, 534; *Law v. Law*, 2 Coll. 41; *Cropper v. Knapman*, 2 Y. & Coll. 338.

(c) *Travis v. Milne*, 9 Hare, 141, 150, by Turner V. C. In *Stainton v. The Carron Company*, 18 Beav. 146, Romilly M. R. approved of this statement of the general principle, and held that it did not apply to such a partnership as a joint stock company.

(d) *Jesse v. Bennett*, 6 De G., M. & G. 609.

The writ of *ne exeat regno* has been considered in the nature of equitable bail, (e) and it has been understood that a court of equity proceeds, in respect to it, by analogy to the proceedings at law in cases of legal bail. (f)

* It has been said that the object of this writ is to obtain security from a person intending to leave the country, when the other party has not a legal remedy, and cannot hold him to bail. (g) But it is settled, that, though a plaintiff, swearing to the balance of an account, may have bail at law, yet the court of chancery, holding a concurrent jurisdiction upon the head of account, the plaintiff may also have the writ of *ne exeat regno*. And where a creditor files a bill for an account and administration of the assets, if there is a *clear* affidavit of assets received, the court of chancery will grant the writ. (h)

Generally speaking, the affidavit on which the application for a *ne exeat regno* is grounded must be as positive as to the equitable debt as an affidavit of a legal debt, to hold to bail; (i) but in the case of partners and executors, information and belief is held sufficient. (j) The affidavit ought to swear, or aver to the best of the knowledge and belief of the deponent, that assets have come to the hands of the executor or administrator; (k) and it should appear distinctly that he has a present intention to leave the country. (l)

In *Moore v. Meynell*, (m) Lord Cowper ordered a writ of *ne exeat regno* to issue against a married woman, the administratrix of a former husband, who had come to England to get in his property. And Lord Macclesfield afterwards refused to discharge this order. (n) And upon the authority * of this case, Lord Hardwicke, in *Jerningham v. Glass*, (o) where a wife was executrix of

(e) *Haffey v. Haffey*, 14 Ves. 261.

(f) *Pannell v. Taylor*, 1 Turn. & R. 103. See *Jenkins v. Parkinson*, 2 My. & K. 5; *ante*, 895.

(g) *Swift v. Swift*, 1 Ball & Beat. 227.

(h) *Jones v. Alephsin*, 16 Ves. 471. But a residuary legatee cannot have a writ of *ne exeat regno* against a debtor of the testator, on the ground that he colludes with the executor. *Graves v. Griffith*, 1 Jac. & W. 646.

(i) 10 Ves. 164; *Amsink v. Barklay*, 8 Ves. 597.

(j) *Jackson v. Petrie*, 10 Ves. 164;

Rico v. Gualtier, 3 Atk. 501.

(k) *Anon.* 2 Ves. sen. 489. A present vested interest, though capable of being divested, is a sufficient interest to support a writ of *ne exeat regno*. *Howkins v. Howkins*, 1 Dr. & Sm. 75, 78.

(l) *Darley v. Nicholson*, 1 Dr. & W. 66.

(m) 1 Dick. 30.

(n) 3 Atk. 409, 410.

(o) 3 Atk. 409; *S. C. nomine Ternegan v. Glass*, Ambl. 62; *S. C. nomine Jernegan v. Glass*, 1 Dick. 107.

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a former husband, and her second husband was gone out of the kingdom, granted the writ against her alone. Again, in *Moore v. Hudson* (*p*) (July, 1821), Sir John Leach V. C. granted writs of *ne exeat regno* against husband and wife, executrix, the plaintiff undertaking not to serve more than one of the writs. But in *Pannell v. Tayler* (*q*) (February 1823), Lord Eldon, after great consideration, decided that a writ of *ne exeat regno* against a *feme covert* executrix or administratrix cannot be sustained; and the preceding cases must, therefore, it should appear, be regarded as overruled. (*r*)

In *Bunyan v. Mortimer*, (*s*) a bill was filed against a husband and wife in respect of a demand against the wife as executrix. The husband, who was a bankrupt, had appeared for himself and his wife, and had gone abroad, and an attachment had issued against him for want of an answer. And it was held by Sir J. Leach V. C. that such an attachment could not be granted against the wife, until an order had been obtained that she should answer separately, and that she must have notice of the motion for that order.

Although suits in equity are not within the words of the statute of limitations (21 Jac. 1, c. 16), yet they are within the spirit and meaning of it; and, therefore, upon all legal demands, the courts of equity are bound to yield obedience to its provisions. (*t*)

(*p*) Madd. & Geld. 218

(*q*) 1 Turn. & R. 96.

(*r*) It appears, from the decree in *Moore v. Meynel*, that the *feme covert* in that case had large separate property, and had executed bonds, &c. And Lord Eldon observed thereupon, that there may be a very great difference between the case of a married woman who has separate property and the case of a married woman who is administratrix, and as administratrix can have no separate property at all. 1 Turn. & R. 103.

(*s*) Madd. & Geld. 278.

(*t*) *Hovenden v. Annesley*, 2 Sch. & Lef. 630, 631; *Foley v. Hill*, 1 Phill. C. 399; *Burdeck v. Garrick*, L. R. 5 Ch. App. 234, 240; [*McCartee v. Camel*, 1 Barb. Ch. 455. In *Sugar River Bank*

v. Fairbank, 49 N. H. 139, 140, Bellows C. J. said: "As a general rule, courts of equity are bound by a statute of limitations equally with courts of law, and they cannot disregard the plain requirements of such statute; for that would be to repeal it. Even when the statute in terms applies only to actions at law, which are enumerated, courts of equity act in analogy to it, and refuse to grant relief in cases coming within its provisions. In the case of executors and administrators, the limitations imposed by statutes are more stringently enforced than those of the general statute of limitations, both at law and equity; and it has been held that the omission to embody in the former statute the exceptions contained in the latter, indicates a purpose to

* In *Webster v. Webster*, (*u*) the testator died in 1786, but the will was not proved by the executor until 1802. Nevertheless, on a bill filed by the creditor against the executor in 1803, a plea of the statute of limitations was allowed, because the bill alleged that the defendant had possessed himself of the personal estate previously to 1792, and might, therefore, have been sued as an executor *de son tort*.

And it appears to be now settled, that if time has once begun

make the bar of suits against executors and administrators absolute. *Atwood v. R. I. Agricultural Bank*, 2 R. I. 191. This limitation of suits against executors and administrators has been stringently enforced in this state, both at law and in equity. *Judge of Probate v. Brooks*, 5 N. H. 82; *Ticknor v. Harris*, 14 N. H. 272; *Cutter v. Emery*, 37 N. H. 567; *Walker v. Cheever*, 39 N. H. 420. The latter was a suit in equity against executors, and one ground of defence was, that the claim was not exhibited to the executors within two years from the grant of administration, nor the suit brought within three years; and the suit was held to be barred upon both grounds, and no question was made on account of its being a suit in equity. In *Atwood v. R. I. Agricultural Bank*, 2 R. I. 191, under a law much like our own, it was decided that the statute limiting suits against executors and administrators to three years, was binding upon courts of equity, as well as upon courts of law. In *Pratt v. Northam*, 5 Mason, 95, the same doctrine was held by Story J. He says, 'that the statute of limitations as to executors and administrators is not created for their own security and benefit, but for the security and benefit of the estates which they represent.' 'It is a wholesome provision, designed to produce a speedy settlement of estates, and the repose of titles derived under persons who are dead. If this statute could be avoided by any fraud (and on that point I give no opinion), it must be the fraud of the executors or administrators themselves, and not of third persons with whom they have no connection or

privity.' See *Wells v. Child*, 12 Allen, 333; *Bacon v. Pomeroy*, 104 Mass. 577. As to whether a court of equity will, after six years' acquiescence, decree an account between a surviving partner and the estate of a deceased partner, see *Barber v. Barber*, 18 Ves. 286, the authority of which, however, is much shaken by the judgment of Lord Brougham in *Robinson v. Alexander*, 8 Bligh N. S. 375. In *Tatam v. Williams*, 3 Hare, 347, a bill by surviving partners against the executors of a partner, who died thirteen years before the institution of the suit, for an account of his partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death, was dismissed by Wigram V. C. with costs, on the ground of lapse of time. Again, in *Baker v. Read*, 18 Beav. 398, where a bill had been filed after seventeen years to set aside a purchase of the testator's estate by his executor at an undervalue, Romilly M. R. refused relief, although his honor added that if the transaction had been fresh, he should have set it aside without a moment's hesitation. See, further, as to laches and lapse of time being a bar in equity, *Portlock v. Gardner*, 1 Hare, 594; *Browne v. Cross*, 14 Beav. 105; *Sibbering v. Balcarras*, 3 De G. & Sm. 735; *Wright v. Vanderplank*, 2 Kay & J. 1; *Aspland v. Watte*, 20 Beav. 474; *Mills v. Drewitt*, 20 Beav. 632; *Hartwell v. Colvin*, 16 Beav. 140; *Downes v. Bullock*, 25 Beav. 54; 9 H. L. Cas. 1, S. C. conf.; *Flood v. Patteson*, 29 Beav. 293.

(*u*) 10 Ves. 93.

to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative is constituted to him. The rule in this respect appears to be the same in equity (*x*) as at law. (*y*)

In cases of fraud or mistake, courts of equity hold that the statute runs from the discovery; because the laches of the plaintiff commences from that date. (*z*)

* It was held by Sir Anthony Hart V. C. in *Sterndale v. Hankinson*, (*a*) that a bill which had been filed by one creditor on behalf of himself and all other creditors, prevented the statute of limitations (21 Jac. 1) from being a bar to a claim of another creditor, who had come in under the decree. And his honor stated that he entertained no doubt that every creditor had, after the filing of the bill, an inchoate interest in the suit to the extent of its being considered as a demand, and to prevent its being shut out because the plaintiff had not obtained a decree within the six years. (*b*) But in *Berrington v. Evans* (*c*) (a case which rose after the statute 3 & 4 W. 4, c. 27, s. 40, hereinafter mentioned, came into operation), where Berrington, a judgment creditor, had allowed twenty years to elapse without taking steps to recover his debt, and then ascertained that during the twenty years a suit had been instituted by a creditor named Kemp, for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in court available for the payment of the remainder; Lord Abinger C. B. held that such creditor was barred by the statute from proving his debt before the master, and receiving payment ratably with the other creditors. And his lordship observed, that if he were obliged to consider the effect of the decision of *Sterndale v. Hankinson* as establishing a general rule, under all circumstances, that the filing a

(*x*) *Freak v. Cranefeldt*, 3 My. & Cr. 499.

(*y*) *Ante*, 1951, and note (*p*).

(*z*) *Brooksbank v. Smith*, 2 Y. & Coll. 58. An executor cannot protect himself by the statute of limitations from payment of a debt due from himself to his testator by deferring proof of the will. The probate will be considered to have

relation to the testator's death, and the debt will be treated as assets in the executor's hands at that time. *Ingle v. Richards*, 28 Beav. 366; *ante*, 293.

(*a*) 1 Sim. 393.

(*b*) See, also, *Tollner v. Marriott*, 4 Sim. 19; *Watson v. Birch*, 15 Sim. 523.

(*c*) 1 Y. & Coll. 434.

bill by one creditor of A. on behalf of himself and all others, lets in the claims of all the other creditors, it was clear that the new statute would have no *application to the present case, because this would then be the suit of Kemp as well as Berrington, and the bill having been filed within the twenty years, Kemp's interest could not be affected by the new statute; but the learned judge added, that he could not conceive that the case went the length of deciding that time could, under no circumstances, be a bar in such a suit, either on the statute analogy, or any other. (*d*)

It seems to have been held that notice in a newspaper by a personal representative, that he will pay all debts justly due from his testator, will prevent a debt from being barred by the statute of limitations. (*e*) But a debt is not taken out of the statute by an advertisement published by the administrator, requesting all persons having claims on the estate to send in statements of their demand prior to their being laid before A. B., by whom the persons claiming to be creditors are to submit to be examined touching the same, if he shall see occasion in order to their being approved and paid, or rejected, if such latter course be deemed expedient. (*f*)

In *Williamson v. Naylor*, (*g*) a testator by his will declared that one fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his will. The schedule contained both the names of the creditors and the debts due to them respectively. And Alderson B. held that the direction so given for payment of these debts prevented the operation of the statute of limitations; and that where a testator revives debts which have been barred by the statute, he may appropriate a specific fund for their payment, *and if the fund is not sufficient, the creditors must take ratably. (*h*)

In *Barton v. Tattersall*, (*i*) it was held by Sir John Leach,

(*d*) See, also, *Tatam v. Williams*, 3 Hare, 347.

(*e*) *Scott v. Jones*, 1 Russ. & My. 255. But see stat. 9 Geo. 4, c. 14; *ante*, 1947. It is difficult to reconcile this decision with the principle laid down in *Tanner v. Smart*, 6 B. & C. 603, and the cases in accordance with it decided upon the construction of this statute.

(*f*) 1 Russ. & My. 255; 4 Cl. & Fin. 382.

(*g*) 3 Y. & Coll. 208.

(*h*) See, also, *Rose v. Gould*, 15 Beav. 189.

(*i*) 1 Russ. & My. 237; recognized by Lord Cottenham in *Ward v. Painter*, 5 My. & Cr. 298.

on a bill filed to administer the assets of a person who had taken the benefit of the insolvent acts, that the rights of his creditors, as to debts scheduled under the insolvency, were not affected by the statute of limitations; on the ground that the liability arose in respect, not of a promise, but of a lien created by the acts.

After the death of one of two partners, the survivor cannot set up the statute as a bar to a demand against the assets of the deceased. (*k*)

The question as to the parties who have a right to insist on the statute, in bar of the demand, in case the executor declines so to do, has been already discussed. (*l*)

In *Sirdefield v. Price*, (*m*) on a bill by a creditor against an executor, for payment of his demand, and an account of the testator's estate, the court, in consequence of some doubt respecting the validity of the debt, retained the bill for a year, with liberty for the plaintiff to bring an action. And the statute of limitations having taken effect between the filing of the bill and the decree, the court restrained the defendant from insisting at law on the benefit of that statute.

It must be observed that, generally speaking, the statute of limitations (21 Jac. 1, c. 16) does not run against a * trust. (*n*)

(*k*) *Winter v. Innes*, 4 My. & Cr. 101. It may be questioned whether the representatives of the deceased partner can set up the statute against a claim by a creditor of the firm, whilst the surviving partner continues liable, and the estate of the deceased partner continues liable to contribution at the suit of the surviving partner. *Ib.*; *Braithwaite v. Britain*, 1 Keen, 206. The mere circumstance that the partnership accounts are unsettled does not disentitle the representatives of the deceased partner from the protection of the statute. *Way v. Bassett*, 5 Hare, 68. See, also, *Brown v. Gordon*, 16 Beav. 302; *ante*, 1949.

(*l*) *Ante*, 1949, 1950. [In *Partridge v. Mitchell*, 3 Edw. Ch. 180, it was held to be competent for any party in interest to set up the statute of limitations in bar of a claim against the estate of a person de-

ceased, without the concurrence of the administrator.]

(*m*) 2 Y. & Jerv. 73.

(*n*) *Hollis's case*, 2 Ventr. 345; *Hargreaves v. Michell*, 6 Madd. 326; *Barker v. Martin*, 5 Sim. 380; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 My. & Cr. 41; *Dickenson v. Lord Holland*, 2 Beav. 130; *Obee v. Bishop*, 1 De G., F. & J. 137; *Brittlebank v. Goodwin*, L. R. 5 Eq. Ca. 545; *Woodhouse v. Woodhouse*, L. R. 8 Eq. Ca. 514. [See *Yingling v. Hesson*, 16 Md. 112. Executors and administrators are express trustees in whose favor the statutes of limitation do not run to bar the claims of legatees or distributees. *Lafferty v. Turley*, 3 Sneed, 157; *Amos v. Campbell*, 9 Florida, 187; *Knight v. Brawner*, 14 Md. 1; *Smith v. Smith*, 7 Md. 55; *Picot v. Bates*, 39 Missou. 292; *Bailey v. Shannonhouse*, 1 Dev. Eq. 416; *Wren v. Gayden*, 2 Miss. 365.]

Accordingly, a trust or charge created by will upon the *real* estate for the payment of debts, prevents the statute from running against such debts as were not barred in the testator's lifetime, (*o*) though such a trust does not revive a debt on which the statute had taken effect before the will came into operation, viz, before the testator's death. (*p*) But a trust or charge by will upon the *personal* estate does not at all prevent the operation of the statute. For the law vests the personal estate of the deceased in his executors or administrators, as a fund for the payment of his debts, and he cannot, by his will, create a special trust for that purpose. Consequently, such a trust has no legal operation. (*q*) Where a testator directed his debts to be paid out of his real and personal estate, and he afterwards provided that if his personal estate should fall short in paying his debts, then he empowered his executors to enter into the receipts of the rents of his freehold, until the same should be wholly paid off; it was held that, notwithstanding the personal estate was sufficient for payment of the debts, a trust had been created for payment of the debts out of his realty, so as to prevent the operation of the statute; and that the real estate remained liable to pay a simple contract debt which had been left unpaid after distribution of the residuary personal estate. (*r*)

In a case where the statute was pleaded in bar to a legacy *demanded, due twenty years before, Lord Nottingham held that a legacy was not barred by the statute, nor ever had been so. (*s*) But though before the statute of 3 & 4 W. 4, c. 27 (hereafter

(*o*) *Burke v. Jones*, 2 Ves. & B. 275; *Parker v. Ash*, 1 Vern. 257; [*Wood v. Hughes v. Wynne*, 1 Turn. & R. 307; *Ricker*, 1 Paige, 616; *Doebler v. Snavely*, *Hargreaves v. Michell*, 6 Madd. 326; 5 Watts, 225; *Irby v. McCrea*, 4 Desaus. 422; *Kent v. Dunham*, 106 Mass. 586, 591; *Brooks v. Lynde*, 7 Allen, 64, 66; [*Pettingill v. Pettingill*, 60 Maine, 423, 424.]

(*p*) 2 Ves. & B. 275; 6 Madd. 326; *O'Connor v. Haslem*, 5 H. L. Cas. 170.

(*q*) *Scott v. Jones*, 4 Cl. & Fin. 382, in which case the house of lords affirmed the judgment of Sir John Leach, and reversed that of Lord Brougham, 1 Russ. & My. 255. See, also, accord. *Freak v. Cranefeldt*, 3 My. & Cr. 499; *Evans v. Tweedy*, 1 Beav. 55.

(*r*) *Crallan v. Oulton*, 3 Beav. 1; *Moore v. Petchell*, 22 Beav. 172.

(*s*) *Anon.* 2 Freem. 22, pl. 20. See, also,

Lafferty v. Turley, 3 Sneed, 157; *Thompson v. M'Gaw*, 5 Watts, 161; *Perkins v. Gartnell*, 4 Harr. (Del.) 270; Genl. Sts. Mass. c. 97, § 22, expressly excludes the bar of the statute. See *Souzer v. De Meyer*, 2 Paige, 574; *Smith v. Remington*, 42 Barb. 75; *McCartee v. Camel*, 1 Barb. Ch. 455, 465; *Norris's Appeal*, 71 Penn. St. 106, 120, 121; *Cartwright v. Cartwright*, 4 Hayw. 134; *Sparhawk v. Buell*, 9 Vt. 41.]

mentioned) no statute could be pleaded to a legacy, yet presumption of payment, from permitting the assets to be distributed without claiming the legacy, was a good ground of defence by way of answer. (t) It must, however, be borne in mind, that although, generally speaking, a long lapse of time might lead to the presumption of payment of legacies, yet that presumption, as the like presumption in the case of specialty debts, was liable to be rebutted by circumstances. (u)

By stat. 3 & 4 W. 4, c. 27, s. 40, it is enacted, that "after the 31st of December, 1833, no action or suit, or *other proceeding*, shall be brought to recover any sum of money secured by any mortgage, judgment, (x) or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, (y) but within twenty * years next after a pres-

(t) *Higgins v. Crawford*, 2 Ves. jr. 572; *Pickering v. Stamford*, Ib. 582; *Jones v. Turberville*, Ib. 11; *Brown v. Claxton*, 3 Sim. 225; *Campbell v. Graham*, 1 Russ. & My. 453; S. C. in Dom. Proc. 8 Bligh, 622; *Baldwin v. Peach*, 1 Y. & Coll. 453. See *Prior v. Horniblow*, 2 Y. & Coll. 200; *Grenfell v. Girdlestone*, Ib. 662; [*Andrews v. Sparhawk*, 13 Pick. 393; *Carr v. Chapman*, 5 Leigh, 164; *Hayes v. Goode*, 7 Leigh, 452; *Hudson v. Hudson*, 3 Rand. 117; *Sasscer v. Young*, 6 Gill & J. 243; *Ivy v. Rogers*, 1 Dev. Ch. 58; *Sager v. Warley*, Rice Ch. 26; *Skinner v. Skinner*, 1 J. J. Marsh. 594. An account of administration demanded after a great lapse of time will be denied. *Parkes v. Rucker*, 5 Leigh, 149; *Rayner v. Pearsall*, 3 John. Ch. 18; *Mooers v. White*, 6 John. Ch. 360; *Carr v. Chapman*, 5 Leigh, 164; *Hudson v. Hudson*, 3 Rand. 117; *Ives v. Sumner*, 1 Dev. Eq. 338; *Davis v. Yerby*, 1 Sm. & M. Ch. 508; *Lupton v. Janney*, 13 Peters, 381; *Hays v. Goode*, 7 Leigh, 452. After a long lapse of time, the debts of an estate may be presumed to be satisfied. *Coleman v. Lane*, 26 Geo. 515; *Longworthy v. Baker*, 23 Ill. 484; *Rosenthal v. Renick*, 44 Ill. 202; *Donaldson v. Raborg*, 28 Md. 34; *Buie v. Buie*, 2 Ired. (Law) 87.]

23; [*Estate of Brown*, 8 Phil. (Penn.) 197.]

(x) See *Watson v. Birch*, 15 Sim. 523.

(y) This statute applies to legacies payable out of personal estate as well as to legacies charged on real estate. *Sheppard v. Duke*, 9 Sim. 567; *Bullock v. Downes*, 9 H. L. Cas. 1, 14. A residue bequeathed by will is clearly within the statute. *Prior v. Horniblow*, 2 Y. & Coll. 200; *Christian v. Devereux*, 12 Sim. 264; *Portlock v. Gardner*, 1 Hare, 594, 604; *Adams v. Barry*, 2 Coll. 285, 290, 293. But where more than twenty years after the death of the testator, the representative of one of his executors, and the residuary legatee under his will, filed a bill against the representative of the co-executor, to recover residuary assets of the testator, alleged to have been possessed by the co-executor, it was held that the plaintiffs, though barred by the statute as to assets possessed by the executor more than twenty years before the filing of the bill, were not so barred as to assets possessed by him since that time. *Adams v. Barry*, 2 Coll. 290. See, also, *Bright v. Larcher*, 27 Beav. 130; 4 De G. & J. 608, S. C. Where the right to sue for the legacy as such was barred by the statute, but the executor, who had possessed assets to pay it, died leaving it unpaid, and having charged his estate with his debts, it was

(u) *Ravenscroft v. Frisby*, 1 Coll. 16,

ent right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment (z) of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given." (a)

By sect. 42, "After the said 31st of December, 1833, no arrears of rent or of interest, in respect of any sum of money charged upon or payable out of any land or rent, *or in respect of any legacy*, (b) or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment (c) of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. Provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next * before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

In the construction of this statute it has been held that a suit

held that the legacy could not be claimed under the charge of debts. *Piggott v. Jefferson*, 12 Sim. 26.

(z) See *Holland v. Clark*, 1 Y. & Coll. C. C. 151, as to what is a sufficient acknowledgment. See, also, *St. John v. Boughton*, 9 Sim. 219.

(a) By stat. 23 & 24 Vict. c. 38, s. 13,

this section is extended to cases of claims to the estates of intestates.

(b) An annuity given by a will, forming no charge upon land, but being personal only, is not within this enactment. See *Roch v. Callen*, 6 Hare, 531; *Re Ashwell's Will*, Johns. 112.

(c) See note (z), *supra*.

to make an executor account for a sum of money which had been bequeathed to him by his testator upon certain trusts, and which had been severed by the executor from the testator's personal estate, and the interest of which had, for a time, been applied upon the trusts of the will, so that the fund had ceased to bear the character of a legacy, and had assumed that of a trust fund, must be considered not as a suit for a legacy, but as a suit to compel a party to account for a breach of trust; and therefore that is not within the terms of the act. And in *Watson v. Saul*, (*d*) Wood V. C. observed that the distinction between mere charges and express trusts pointed out by Lord Eldon in *King v. Denison*, (*e*) was the foundation upon which the 40th section rests, and that the provisions of that section were never intended to apply to cases of express trusts. (*f*)

* It has been shown, in a previous part of this work, (*g*) under what circumstances an executor may retain a legacy, by way of set-off against a debt due from the legatee to the testator. But the executor cannot set off, against a demand upon him as executor, a debt due to him individually. (*h*)

(*d*) 1 Giff. 188, 196.

(*e*) 1 Ves. & B. 260.

(*f*) *Phillipo v. Munnings*, 2 My. & Cr. 309. See, also, accord. *Dinsdale v. Dudding*, 1 Y. & Coll. C. C. 265; *Commissioners of Charitable Donations v. Wybrants*, 2 Jones & L. 182, 196, per Sugden C. of Ireland; *Jacquet v. Jacquet*, 27 Beav. 332; *Snow v. Booth*, 2 K. & J. 132; 8 De G., M. & G. 69, S. C.; *Burrows v. Gore*, 6 H. L. Cas. 907; *Dickinson v. Teasdale*, 31 Beav. 511; 1 De G., J. & Sm. 52; *S. C. Proud v. Proud*, 32 Beav. 234. See, further, as to the statute running against trusts, *Ravenscroft v. Frisby*, 1 Coll. 16; *St. John v. Boughton*, 9 Sim. 219. See, also, *Roch v. Callen*, 6 Hare, 531, 536; *Young v. Lord Waterpark*, 13 Sim. 199, 204; *Gough v. Bult*, 16 Sim. 323; *Playfair v. Cooper*, 17 Beav. 187; *Lord Brougham v. Lord William Poulett*, 19 Beav. 119, 134; *Dix v. Burford*, 19 Beav. 409, 412. See, likewise, *Francis v. Grover*, 5 Hare, 39; *Hughes v. Williams*,

3 Mac. & G. 633; *Hunter v. Nockolds*, 1 Mac. & G. 640; *Cox v. Dolman*, 2 De G., M. & G. 592; *Snow v. Booth*, 2 K. & J. 132; 8 De G., M. & G. 69, S. C.; *Davenport v. Stafford*, 14 Beav. 319, 331; *Downes v. Bullock*, 25 Beav. 54; 9 H. L. Cas. 1; *S. C. Smith v. Acton*, 26 Beav. 210; *Lewis v. Duncombe*, 28 Beav. 175; *Round v. Bell*, 30 Beav. 121; *Tyson v. Jackson*, 30 Beav. 384; *Hodgson v. Bibby*, 32 Beav. 221; *Mason v. Broadbent*, 33 Beav. 296; *Edmunds v. Waugh*, L. R. 1 Eq. 418; *Gyles v. Gyles*, Cas. temp. Napier, 257; *Butler v. Carter*, L. R. 5 Eq. Ca. 276. A trust created by a testator of his real estate for payment of his debts does not remove from a creditor the consequences arising from his negligence or acquiescence, whether expressed or implied. *Harcourt v. White*, 28 Beav. 303, 309.

(*g*) *Ante*, 1304 *et seq.* See, also, *Richards v. Richards*, 9 Price, 219.

(*h*) *Whitaker v. Rush*, Ambl. 407; *Medlicot v. Bowes*, 1 Ves. sen. 208; *Gale*

There has also already been occasion to show under what circumstances the court of chancery will restrain an *insolvent* or *bankrupt* executor, and appoint a receiver. (i) And it is now proposed to consider further, in what other cases the court will exercise this jurisdiction over executors and administrators.

When a receiver shall be appointed:

If, in the case of an executor or administrator, any misconduct, waste, or improper disposition of the assets is shown, the court will instantly interfere and appoint a receiver. (k) So the bankruptcy of a sole executor and trustee is a ground for such an appointment. (l) But the administration *is not to be taken from the executor upon slight grounds. (m)

In *Faith v. Dunbar*, (n) the executor being out of the jurisdiction, a receiver was appointed under stat. 36 Geo. 3, c. 90, and administration was afterwards taken out. Under these circumstances Lord Eldon referred it to the master to reconsider the appointment of receiver, regard being had to the administration granted.

The subject of the appointment of a receiver, during a litigation in the ecclesiastical court for probate or administration, has been already considered, (o) and mention made of the provisions

v. Luttrell, 1 Y. & Jerv. 180; *ante*, 1876, 1952. But in — *v. Wood*, 2 P. Wms. 131, money lent and goods delivered by the executor to the legatee were held to be in part payment, and the court said that the executor, if sued in equity for the legacy, might have insisted that the legatee had received so much of it by money and goods.

(i) *Ante*, 236; [*Elmendorf v. Lansing*, 4 John. Ch. 562.]

(k) *Anon.* 12 Ves. 5, by Sir Wm. Grant; *Middleton v. Dodswell*, 13 Ves. 268. See, also, *Havers v. Havers*, *Barnard. Chanc.* 24; *Richards v. Perkins*, 3 Y. & Coll. 299; [*Boyd v. Murray*, 3 John. Ch. 48; *Stairley v. Rabe*, 1 McMullan Ch. 22; *Jenkins v. Jenkins*, 1 Paige, 243; *Edmonds v. Crenshaw*, 1 Harper Ch. 224. But not on account of a mere misunderstanding between executors, though one of them is

a man of limited means. *Fairbairn v. Fisher*, 4 Jones (N. Car.) Eq. 390.]

(l) *Steele v. Cobham*, L. R. 1 Ch. App. 525. The fact of the assignees not being before the court was held not a sufficient reason for refusing to appoint a receiver.

(m) 13 Ves. 268. See *Smith v. Smith*, 2 Y. & Coll. 353; *Whitworth v. Whydon*, 2 Mac. & G. 52. [It has been held that a court of equity has no power to remove or discharge one executor and appoint another. *Hargood v. Wells*, 1 Hill Ch. 59; *Galluchat, ex parte*, 1 Hill Ch. 148.]

(n) *Cooper*, 200. [So a court of equity may appoint a receiver, where an executor departs with a purpose of remaining without the state, leaving the estate and those entitled to it within the state. *Galluchat, ex parte*, 2 Hill Ch. 148.]

(o) *Ante*, 499–502.

of the probate act, relative to the appointment of receivers of real estate *pendente lite*. (p)

The court has no jurisdiction to order, in a summary way, the executor of a deceased receiver to bring in and pass his testator's accounts, and pay the balance to be found due out of the assets. (q)

The court will also appoint a proper person to protect a testator's estate where the circumstances require it, until a legal personal representative is appointed; but a bill to protect and also to administer the estate is irregular. (r)

In a suit against an executor or administrator, other than a suit for a general administration of the assets, the liability to costs will, generally speaking, be governed by the ordinary rule, which throws them on the unsuccessful party. (r¹) Accordingly, if an executor or administrator is sued in equity * by a creditor for a debt of the deceased, and the creditor succeeds in establishing his demand, the court will direct the payment of the amount due to the creditor, together with his costs, out of the assets. (s) The executor, however, will not be decreed to pay the costs, if the assets are insufficient to pay both debts and costs. (t)

The court makes no order, in a suit of this kind, with regard to the payment of the costs of the personal representative, it being supposed that he may reimburse himself out of the assets; so that if there be no further fund out of which he may reimburse himself, the costs must come out of his own pocket. And even if it should appear, upon taking the accounts, that there is no such fund, still the court will not give any directions with regard to his costs. (u)

(p) *Ante*, 497.

(q) *Jenkins v. Briant*, 7 Sim. 171. The proper course, in such a case, if the balance is not ascertained so that the recognizances may be put in suit, is to file a bill against the executor for an account. But this course may be avoided, if the executor will consent to an order to pass the receiver's accounts and to pay the balance. 2 Dan. Pr. 1624, 2d ed.

(r) *Overington v. Ward*, 34 Beav. 175.

(r¹) [See *ante*, 1895, note (f¹), 1978; *Brigham v. The Executors*, 15 Vt. 788.]

(s) 2 Dan. Ch. Pr. (4th Am. ed.) 1422; *Lyse v. Kingdom*, 1 Coll. 184.

(t) 2 Dan. Ch. Pr. (4th Am. ed.) 1422, note (7); *Lyse v. Kingdom*, 1 Coll. 184. The rule at law is different; for whenever an action is brought against an executor for a debt of the testator, and he makes an unsuccessful defence, there shall be a judgment against him for the costs of the plaintiff *de bonis testatoris, et si non, de bonis propriis*. See *ante*, 1974.

(u) 2 Dan. Ch. Pr. (4th Am. ed.) 1422. "It is a settled rule," said Lord Redesdale,

But where a suit is instituted, either by creditors or residuary legatees, for a general administration of assets, so that the whole estate of the deceased is necessarily taken from the hands of the personal representative, and distributed under the direction of the court, his costs of suit, as between attorney and client, are, generally speaking, provided for; and even where the assets are insufficient to pay the creditors of the deceased, these costs continue the first charge on the estate. (*x*)

Costs in an administration suit:

of the executor, &c. out of the fund:

* But this rule is by no means invariable. For if the suit was occasioned by the ignorance or unreasonable caution, (*y*) or by the misbehavior or the negligence (*z*) of the executor or administrator, his costs of the suit, (*a*) or of so much of the suit as was occasioned by such miscarriage, will not be allowed; (*b*) whilst in cases marked by fraud, evasion, neglect of duty, the court will not merely refuse to allow the executor

when the executor, &c. shall be refused his costs:

in *Adair v. Shaw*, 1 Sch. & Lef. 280, "that the executors of an insolvent shall not have costs. To allow them would be productive of the worst consequences. They need not have administered." But this observation does not apply to the costs of executors who are the defendants in administration suits. See *infra*, and *post*, 2036.

(*x*) *Tipping v. Power*, 1 Hare, 405, 411; *Gaunt v. Taylor*, 2 Hare, 413; *ante*, 988, 989; *Jackson v. Woolley*, 12 Sim. 12; *Ottley v. Gilby*, 8 Beav. 602; *Tanner v. Dancy*, 9 Beav. 339; [2 Dan. Ch. Pr. (4th Am. ed.) 1423.] So where, on a bill filed by a simple contract creditor, the only specialty creditor was restrained by injunction from proceeding in his action at law, and the assets proved insufficient to pay him, the executor was allowed his costs out of them. *Young v. Everest*, 1 Russ. & My. 426. So the representative of a defaulting executor, fairly accounting, is entitled to deduct his costs of suit out of the assets, though they be insufficient to repair the breach of trust. *Haldenby v. Spofforth*, 9 Beav. 195. If after the suit is instituted the executor or administrator becomes bankrupt or insol-

vent, and is indebted to the estate of the deceased, the costs of the executor or administrator incurred before his bankruptcy or insolvency will be set off against his debt, but his subsequent costs, if properly incurred, will be allowed out of the estate. *Samuel v. Jones*, 2 Hare, 246. See, also, *Cotton v. Clark*, 16 Beav. 134.

(*y*) *Knight v. Martin*, 1 Russ. & My. 70; *Lyse v. Kingdom*, 1 Coll. 184; [*Colson v. Martin*, Phill. (N. Car.) 125.]

(*z*) *O'Callaghan v. Cooper*, 5 Ves. 117.

(*a*) Nor will the costs of his assignees, if he has become bankrupt, and they are made defendants. *Massey v. Moss*, 1 Hare, 319.

(*b*) *Heighington v. Grant*, 1 Phill. C. 600; *Bailey v. Gould*, 4 Y. & Coll. 221; *Hewett v. Foster*, 7 Beav. 348; *Noble v. Brett*, 26 Beav. 233; *Beer v. Tapp*, 10 W. R. 277; *Graham v. Wickham*, 34 L. J. N. S. Ch. 220; [*Post v. Stevens*, 13 N. J. Eq. 293; *post*, 2039, note (*n*).] An executor improperly denying assets may be postponed to the debt and costs of the creditor. *Lodge v. Pritchard*, 4 Giff. 294.

his costs out of the assets, but will order him to pay the costs when the executor, &c. shall pay costs: of the suit, or (as in the former case) of so much of the suit as is attributable to the breach of duty on his part. (c)

* After the costs of the executor or administrator are satisfied, the next claim on the fund arising from the personal estate is that of the plaintiff in the suit for his costs incurred in it. (d) Where, indeed, the plaintiff is a sim-

(c) *Heighington v. Grant*, 1 Phill. C. C. 600; *Hewett v. Foster*, 7 Beav. 348; *Hide v. Haywood*, 2 Atk. 126. See, also, *Fell v. Lutridge*, Barnard. Chanc. 322; *Avery v. Osborne*, Ib. 352; *Brown v. How*, Ib. 358; *Vaughan v. Thurston*, Colles, 175; *Bennett v. Attkins*, 1 Y. & Coll. 247; *Baker v. Carter*, Ib. 250; *Tower v. Thompson*, 7 Sim. 145; *Western v. Chapman*, 1 Coll. 181; *Tickner v. Smith*, 3 Sm. & G. 42; *Boynston v. Richardson*, 31 Beav. 340; *Beames on Costs*, 91; [2 Dan. Ch. Pr. (4th Am. ed.) 1418, 1419; *Reynolds v. Carter*, 32 Ala. 444.] It is not the duty or the practice of the court to visit trustees with any penalties in the shape of costs, except when they act from interested motives, or wantonly and intentionally conduct themselves in a vexatious and oppressive manner. *Noble v. Meymott*, 14 Beav. 471, 480, by Romilly M. R.; [*Keeler v. Keeler*, 18 N. J. Eq. 267.] So the mere fact that an executor neglected to render accounts, when asked, is not of itself sufficient to make him liable to the costs of a suit for administering the estate. *White v. Jackson*, 15 Beav. 191. But see *Kemp v. Burn*, 4 Giff. 348; *Springett v. Dashwood*, 2 Giff. 521; *Wroe v. Seed*, 4 Giff. 425. [Where, upon final settlement of an estate, a contest arises between the administrator and distributees, as to whether a particular fund is assets of the estate, or belongs to the administrator individually, and a decision is made in favor of the distributees, the administrator is personally liable for the costs of the proceeding. *Jones v. Dyer*, 16 Ala. 221. See *Hartzell v. Brown*,

5 Binney, 138; *Isenhardt v. Brown*, 2 Edw. Ch. 341. But if the distributees except to the administrator's account, and seek to charge him beyond the amount with which the administrator has debited himself, but fail to produce evidence in support of the exception, it is proper to charge them with the costs consequent thereon. *Jones v. Dyer*, 16 Ala. 221.] As to whether, when an executor is directed to pay interest, he must also pay costs, see *Seers v. Hind*, 1 Ves. jr. 294; *Moseley v. Ward*, 11 Ves. 581; *Ashburnham v. Thompson*, 13 Ves. 402; *Tebbs v. Carpenter*, 1 Madd. 308; *Newton v. Bennet*, 1 Bro. C. C. 362; *Raphael v. Boehm*, 11 Ves. 92, 407, 590; *Eglin v. Sanderson*, 3 Giff. 434, 440; *Walrond v. Walrond*, 29 Beav. 586; *Beames on Costs*, 153. [Though the general rule is that executors must pay costs when they pay interest, because they are in default, yet, where the devisee, or *cestui que trust*, demands more than he is entitled to receive, and the executor properly submits to the direction of the court, he will not be compelled to pay costs. *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508.]

(d) *Hearn v. Wells*, 1 Coll. 323. But the plaintiff shall not be allowed the costs where the litigation was useless. *Ottley v. Gilby*, 8 Beav. 602. So where a simple contract creditor, after obtaining an administration order, had notice that the estate was insufficient to pay the specialty debts and costs of the administratrix, his costs of prosecuting the suit after notice were disallowed. *Sullivan v. Bevan*, 20 Beav. 399. See, also, *Thompson v. Clive*, 11 Beav. 475.

ple contract creditor, and it turns out that the estate is not sufficient for the payment of specialty debts, it seems to have been once considered, that the plaintiff ought not to be allowed his costs out of the estate. (e) But in a subsequent case (f) Lord Cottenham ruled otherwise, and observed that it was contrary to reason and to the uniform practice of the court, that specialty creditors, who came in to take the benefit of the suit instituted by a simple contract creditor, should throw the burden of the costs of the suit upon the simple contract creditor, where the assets proved insufficient for the full satisfaction of their claims. And in a still later * case (g) his lordship directed costs as between solicitor and client to be given out of the fund to a simple contract creditor, who was plaintiff in a suit to administer his deceased debtor's estate, although the assets had proved insufficient to satisfy the specialty creditors. But the insufficiency of the fund to pay the debts is the only case in which the plaintiff in a creditors' suit is entitled to his costs as between solicitor and client. (h) In a case (i) where, in a * creditors' suit, a fund

(e) *Young v. Everest*, 1 Russ. & My. 426; *Rowlands v. Tucker*, Ib. 635, *coram* Sir J. Leach M. R.

(f) *Larkins v. Paxton*, 2 My. & K. 320.

(g) *Barker v. Wardle*, 2 My. & K. 818.

(h) *Brodie v. Bolton*, 3 My. & K. 168; *Tootle v. Spicer*, 4 Sim. 510. However, in *Sutton v. Doggett*, 3 Beav. 9, where in a creditors' suit the assets were sufficient to pay the debts, but insufficient to pay the debts and the costs of suit taxed as between party and party, Lord Langdale M. R. ordered the plaintiff's extra costs as between solicitor and client to be paid out of the fund. In *Wroughton v. Colquhoun*, 1 De G. & Sm. 357, where the suit had been instituted by a residuary legatee, and the assets proved insufficient for the payment of the expenses and the general legacies, it was held by Knight Bruce V. C. that the plaintiff was not entitled to his costs as between solicitor and client, except so far as the general estate had been increased by the proceeding. And

his honor, upon the case of *Burkitt v. Ransom*, 2 Coll. 536, being cited as a contrary decision of his own, observed that he must have proceeded, in that case, on the absence of opposition. See, also, *Hearn v. Wells*, 1 Coll. 323; and *Weston v. Clowes*, 15 Sim. 610. But see, *contra*, *Cross v. Kennington*, 11 Beav. 89. And in *Thomas v. Jones*, 1 Dr. & Sm. 134, Kindersley V. C. observed, that although no fixed rule had been followed, in all the cases the tendency of the decisions was in favor of the principle upon which *Cross v. Kennington* was decided. This was the case of a bill filed by a legatee for the administration of a testator's estate, which was insufficient to pay all the legacies, and his honor said that a legatee filing a bill, whether it is expressed or not that he files it on behalf of himself and the other legatees, is considered as representing them all; and applying the principle upon which *Cross v. Kennington* was decided, he held that the plaintiff was entitled to his costs as between solicitor and client.

(i) *Stanton v. Hatfield*, 1 Keen, 358.

had been realized by the diligence of the plaintiff, and the assets were more than sufficient for payment of the debts, the costs of the plaintiff, as between party and party, were ordered to be paid out of the general fund, and the extra costs of the plaintiff were, under the circumstances, directed to be paid *pro rata* by all the creditors who partook of the benefit of the suit.

The principle in creditors' suits is, that where the suit is properly instituted, and the fund to be administered is insufficient to pay the plaintiff his costs, those who have come in and received a benefit under the decree must contribute to make good that loss which the plaintiff has borne on behalf of all the creditors. Therefore, creditors have been held liable to contribute, notwithstanding they obtained payment by reason of being associated with the defendant in the suit, who, as executor or administrator, had a right of retainer against the estate. (*k*) The usual direction in the decree above mentioned does not prevent the court, on further directions, from ordering, if the case warrants it, that the plaintiff shall pay all the costs of the suit. (*l*)

The court, where it has a fund to administer, and the case is one in which the opinion of the court on the question in the cause is necessary to be taken before the executor or administrator can properly administer the estate, has jurisdiction to give the plaintiff his costs, notwithstanding the bill is dismissed. (*m*) And

In *Wetenhall v. Dennis*, 33 Beav. 285, the bill was by a legatee for the administration of an estate of which the assets were insufficient for payment of the debts, and probably insufficient to pay the costs of suit; it was held that the costs were payable in the following order: 1. The costs of the legal personal representative as between solicitor and client; 2. The costs and expenses of the plaintiff in selling and getting in of the estate, and the costs of the heir in executing deeds; and 3. The other costs of all parties as between party and party.

(*k*) *Thompson v. Cooper*, 2 Coll. 87.

(*l*) 2 Phill. C. C. 294.

(*m*) *Thomason v. Moses*, 5 Beav. 77; *Westcott v. Culliford*, 3 Hare, 274; *Cooper v. Pitcher*, 4 Hare, 485; *Johnston v. Todd*, 8 Beav. 489; *Turner v. Frampton*, 2 Coll. 331; *Boreham v. Bignall*, 8 Hare, 131; [2

Dan. Ch. Pr. (4th Am. ed.) 1411; *Decker v. Miller*, 2 Paige, 149; *Knox v. Pickett*, 4 Desaus. 199; *Connolly v. Pardon*, 1 Paige, 291; *Floyd v. Barker*, 1 Paige, 480; *Hosack v. Rogers*, 9 Paige, 461; *Chase v. Lockerman*, 11 Gill & J. 185; *Bigelow v. Morong*, 103 Mass. 287.] In *Hay v. Bowen*, 5 Beav. 610, where the bill had been filed by one who was entitled to a contingent reversionary interest, and a decree for an account obtained, but, before the report, the plaintiff's interest wholly failed, it was held that he was not entitled to his costs, either as against the defendants or the fund; [*McCammon v. Worrall*, 11 Paige, 99; *Rosevelt v. Ellithorpe*, 10 Paige, 415. Where any doubt or ambiguity arises under a will, with reference to any bequest or devise, which renders an application to the court necessary, the costs occasioned by such applica-

even in a case where a * person, filling the double character of executor and trustee, makes claim for his own benefit and fails, yet if it is by way of submission of the point to the opinion of the court, he shall be allowed his costs. (*n*)

One consequence of this right of the plaintiff to his costs of the suit appears to be, that if the executor or administrator, after the decree, makes payment of a debt with a view to be reimbursed out of the fund in court, his right to be so reimbursed must be postponed to the payment of the plaintiff's costs; that is, he must run the risk of the fund not being sufficient to pay the costs and also to reimburse him. (*o*) Again, if the suit has been properly instituted and there are either assets in court or outstanding assets to be administered, it seems to have been held that the plaintiff's costs of suit must be paid out of those assets, whatever may be the hardship on the executor or administrator as to his demand on them in respect of having, before suit, paid other creditors of the estate with his own money. (*p*)

tion are to be paid, not out of the property with respect to which the doubt arises, but out of the general assets not otherwise disposed of. 2 Dan. Ch. Pr. (4th Am. ed.) 1427; Wood v. Vanderpool, 6 Paige, 278; Smith v. Smith, 4 Paige, 271; King v. Strong, 9 Paige, 84; Irving v. De Kay, 9 Paige, 521; Rogers v. Ross, 4 John. Ch. 608; Bowditch v. Soltyk, 99 Mass. 136, 141; Deane v. Home for Aged Women, 111 Mass. 132, 135; *ante*, 1909, note (*l*²); Annin v. Vandorin, 14 N. J. Eq. 135; Chase v. Lockerman, 11 Gill & J. 185; Floyd v. Barker, 1 Paige, 480; *ante*, 375, 376; Towle v. Swasey, 106 Mass. 100, 108; Sawyer v. Baldwin, 20 Pick. 388, 389; *ante*, 375, 376, and note; Decker v. Miller, *supra*. In Jacobus v. Jacobus, 20 N. J. Eq. 49, it was held that the costs and proper counsel fees for both parties may be ordered to be paid out of the estate, where, in a proper case, an executor files a bill for directions as to his duties under the will, and no factious or unnecessary opposition or costs are occasioned by any defendant.]

(*n*) Rashleigh v. Master, 1 Ves. jr. 205; [2 Dan. Ch. Pr. (4th Am. ed.) 1414; Decker v. Miller, 2 Paige, 149; Delafield

v. Calden, 1 Paige, 139; Pell v. Ball, Spears (S. Car.), Ch. 48. But where a trustee has a private interest of his own, separate and independent from the trust, and obliges the *cestui que trust* to come into a court of equity, merely to have the point relating to his own private interest determined at the expense of the trust; this is such vexatious behavior, on his part, that he will be decreed to pay the whole costs of suit. 2 Dan. Ch. Pr. (4th Am. ed.) 1414, 1415; Henley v. Phillips, 2 Atk. 48; Dupont v. Johnson, 1 Bailey Eq. 279; Gardner v. Gardner, 6 Paige, 455; Hunn v. Norton, 1 Hopk. 344; Jones v. Deyer, 16 Ala. 221.]

(*o*) Jackson v. Woolley, 12 Sim. 16, 17.

(*p*) Hearn v. Wells, 1 Coll. 323, 332, 333. In this case, Knight Bruce V. C. denied the proposition that an executor has a right *in equity* (whatever may be the rule at law, as to which, see *ante*, 646, 647), to acquire, as a purchaser, an absolute title to specific chattels, by intending so to deal with them, and by paying the testator's debts to an amount exceeding the value of those chattels. But see Vernon v. Thelluson, 1 Phill. C. C. 466, 470; *ante*, 1924.

But the personal representative's right of retainer for his own debt will prevail, as there has already been occasion to show, (q) against the plaintiff's right to his costs.

It was an established rule that creditors were not to be allowed of creditors any of the costs which they were put to, either in the coming in first instance, or in any stage of the proof of their claims under the decree: before the master under the decree. (r) But now by the *40th section of the Consolidated Orders, rule 24, it is directed, that "a creditor who has come in and established his debt in the judges' chambers under a decree or order in a suit shall be entitled to the costs of so establishing his debt, and the sum to be allowed for such costs shall be fixed by the judge, unless he shall think fit to direct the taxation thereof; and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established." (s) Where the creditor fails to establish his debt, it has been lately held that he may be ordered to pay the costs of the inquiry consequent upon his claim. (t)

It has likewise been laid down as a general rule, that next of of next of kin are not to be allowed the costs of establishing their kin coming in under the decree: claims in an administration suit. (u) But if next of kin, after having established their claims, are permitted to mix in the cause as if they had been parties, then in respect of such proceedings they may be entitled to their costs. (x) And in a case (y) where, in a suit for distribution of the intestate's estate, certain persons, not parties to the suit, proved themselves to be next of kin before the master, it was held that they were entitled to be paid the costs of so doing out of the intestate's

(q) *Ante*, 1039.

(r) Nor was a creditor entitled to costs, whose debts had been disallowed by the master, and allowed by the court on petition. *Watkins v. Maule*, Jacob, 105. But if his proof was beneficial to the estate, as where he saved by it the expense of a suit, and there were extraordinary costs, the court would give them on petition. *Harvey v. Harvey*, 6 Madd. 91.

(s) In *Morgan v. Elstob*, 4 Hare, 477, a creditor claimed, in an administration suit, to prove the penalty of a bond, as damages for the non-performance of a contract. The master reported the claim.

On the exceptions, the court gave the creditor liberty to bring an action. The action was brought, and the jury found a verdict for the plaintiff (the creditor), but with nominal damages. The court, upon this result, refused the creditor the costs of making the claim before the master, and the costs of the action, but gave him the costs of the exceptions.

(t) *Hatch v. Searles*, 2 Sm. & G. 147.

(u) *Waite v. Waite*, 6 Madd. 110.

(x) 6 Madd. 110.

(y) *Bennett v. Wood*, 7 Sim. 522; *Yeomans v. Haynes*, 24 Beav. 127.

estate. (z) The principle laid down by Lord Cottenham on this head was, that next of kin, who are not parties, shall be allowed the same costs as *if the plaintiffs had brought them regularly before the court as parties; and, consequently, that if they would, as parties, have been entitled to their costs of proceedings in the master's office for the purpose of making out their claim and their costs of appearing on further directions, but not otherwise, they shall also be allowed those costs on taxation. (a)

(z) See, also, accord. *Bakewell v. Taggart*, 3 Y. & Coll. 173, *coram* Alderson B.

(a) *Hutchinson v. Freeman*, 4 My. & Cr. 490; *Shuttleworth v. Howarth*, Ib. 492; 1 Cr. & Ph. 228. Residuary legatees and other persons served with the decree and obtaining an order (under stat. 15 & 16 Vict. c. 86, s. 42, rule 8) for liberty to attend the proceedings under the decree are, it would seem, in the same position as to costs, as persons parties to the cause. *Morg. & Davey's Costs in Chanc.* 127. These costs do not include costs incurred out of doors in collecting information as to the pedigree — not the costs of private inquiry; but all the costs incurred in the master's office — the costs of proceedings in the suit. But see *Swift v. Swift*, 1 De G., F. & J. 160. And where next of kin, or other persons claiming as a class under the will, succeed in establishing their title, their costs, thus defined, incurred in so doing, are not to be paid exclusively out of the portions attributable to such classes respectively, but out of the general estate before any apportionment of it takes place. 1 Cr. & Ph. 228. So where a legacy is claimed, in an administration suit, by two legatees adversely to each other, the costs must be borne by the testator's estate (inasmuch as the question arises on his will) and not by the legacy. *Wilson v. Squire*, 13 Sim. 212. See, also, *Ripley v. Moysey*, 1 Keen, 578; *Eyre v. Marsden*, 4 My. & Cr. 231. But where a residuary estate was divisible amongst several persons, and an account was made up, and the adults received their shares; and the infants filed a bill

Whether the costs are to be paid out of the particular fund or out of the general estate.

for an account against the executors and the other residuary legatees, who being satisfied, deprecated the proceedings, and the accounts turned out to be substantially correct; it was held that the costs of the suit were payable out of the plaintiff's share alone. *Mackenzie v. Taylor*, 7 Beav. 467. The rule has been laid down to be, that if the executors, admitting the legacy to be payable, sever it from the estate, and a dispute arises between the persons to whom, or some of whom, the legacy belongs, and the court has to decide to whom it belongs, there the particular fund bears the costs; *secus*, if the dispute arises between the persons claiming the residue and the residuary legatee, whether it is payable. *Atty. Gen. v. Lawes*, 8 Hare, 43, by Wigram V. C.; [*Bigelow v. Morong*, 103 Mass. 287; *ante*, 2038, note (m).] Where there are no other assets, the costs must be paid out of the specific legacies *pari passu*. *Bristow v. Bristow*, 5 Beav. 289; *Cookson v. Bingham*, 17 Beav. 262. In an administration suit, involving both real and personal estate, the rule is, that the general personal estate of a testator is liable to all costs occasioned by his mistake, or rendered necessary for the purpose of obtaining the opinion of the court on the construction of his will, though some of those costs may have been incurred in proceedings affecting the real estate only, and the result of which is to benefit a devisee of the real estate. *Ripley v. Moysey*, 1 Keen, 578; *Pickford v. Brown*, 2 K. & J. 426; *Stringer v. Harper*, 26 Beav. 585. But see *Sanders v. Miller*, 25 Beav. 154; *Bagot v. Legge*, 2 Dr. & Sm. 259. It would seem

* It remains to consider in what cases the executor or administrator is entitled to receive his costs from the plaintiff. In a creditor's suit, if it turns out that there are no assets applicable to the payment of the plaintiff's debt, the plaintiff will be ordered to pay the costs. (b) But in *Robinson v. Elliott*, (c) a creditor filed a bill against an executrix, and she stated, by her answer, that there were no assets for the payment of his debt; he, however, persisted in the suit; and the result of the account in the master's office was, that there were no assets unadministered, though the executrix was charged with more than she had admitted. And it was held that the bill should be dismissed without costs as against the executrix. In another case, (d) on further directions, the case appeared to be, that application had been made to an executor for an account, but that he gave no account. The bill was then filed; and by his answer, the defendant stated the accounts; but the plaintiff *took a decree for an account. It turned out, on the master's report, that the account given by the answer was correct; and the question then was as to costs. The vice chancellor gave the plaintiff the costs of the suit up to the decree; and the defendant the costs of the subsequent proceedings.

The court will, immediately upon admission of assets by an executor or administrator, order so much as he admits to have in his hands to be paid into court; (e) though it was formerly thought necessary for the plaintiff to show that the executor or administrator had abused his trust,

that where real estates are sold under a decree in an administration suit, the costs incurred by such sale will be payable out of the estates sold. *Barnwell v. Iremonger*, 1 Dr. & Sm. 242, 255. In the case of a mixed fund of real and personal estate which are administered together, the costs will be apportioned ratably out of each according to their value. *Bunnett v. Foster*, 7 Beav. 540; S. C. on appeal, *sub nom.*; *Christian v. Foster*, 2 Phill. 161; *Eyre v. Marsden*, 4 My. & Cr. 231; *Johnston v. Todd*, 8 Beav. 489; *Cradock v. Owen*, 2 Sm. & Giff. 241. If the costs of an administration suit are increased by its being

also a suit for the executor of the trusts of a settlement, the court has held that the additional costs must be borne by the settlement fund. *Irby v. Irby*, 24 Beav. 525.

(b) *Bluett v. Jessop*, Jacob, 240; *Fuller v. Green*, 24 Beav. 217.

(c) 1 Russ. 599.

(d) *Anon.* 4 Madd. 373.

(e) *Strange v. Harris*, 3 Bro. C. C. 365; *Blake v. Blake*, 2 Sch. & Lef. 26; *Rutherford v. Dawson*, 2 Ball & Beat. 17; [*M'Kim v. Thompson*, 1 Bland, 156; *Clarkson v. De Peyster*, 1 Hopk. 274; 2 Dan. Ch. Pr. (4th Am. ed.) 1771.]

or that the fund was in danger from his insolvent circumstances. (*f*)

The rule appears to have been limited by Lord Redesdale (*g*) to cases in which there are no debts, or the debts are all paid, and there is no purpose for which the money is to be left outstanding. But the rule appears to be much more extensive, and any balance which is admitted to be in the executor's hands will be ordered into court, notwithstanding there are demands on it to which the executor is liable. (*h*) Thus, in *Yare v. Harrison*, (*i*) an executor having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into court, although he stated that an action at law was depending against him for a debt to a considerable amount due from the testator; but with liberty, in case the plaintiff in the action should recover, to apply to the court to have a sufficient sum paid out again. The plaintiff in the action did recover, and the * court ordered the amount to be paid out to *the plaintiff in the action*, and not to the executor. (*k*)

Where the executor admits himself to have been a debtor to the testator at the time of his death, this has always been held a clear admission of assets in his hands to the amount of the debt, and he is compellable to pay it into court accordingly. (*l*) In this case, the person to pay and the person to receive being the same, the court assumes that what ought to have been done has been done, and orders the payment, not as of a debt by a debtor, but as of moneys realized in the hands of the executor. (*m*)

The court, in making an order of this kind, adheres strictly to the rule of acting on the executor's admission only; and will refuse to proceed upon its knowledge derived from any other source. (*n*)

(*f*) *Strange v. Harris*, 3 Bro. C. C. 365; *Blake v. Blake*, 2 Sch. & Lef. 26.

(*g*) *Blake v. Blake*, 2 Sch. & Lef. 26.

(*h*) 2 Dan. Ch. Pr. (4th Am. ed.) 1770, 1771. If an executor admits that all the testator's debts, &c. have been paid, the court will, on motion, order the income of a balance, paid in by the executor, to be paid to the person entitled to the residue. *Dando v. Dando*, 1 Sim. 510. But see *Abby v. Gilford*, 11 Beav. 28.

(*i*) 2 Cox, 377.

(*k*) It having been suggested in this

case, that the executor had incurred unnecessary costs, by defending the action, the question whether he should personally answer to the estate for the amount of such costs was reserved to the hearing.

(*l*) *Mortlock v. Leathes*, 2 Meriv. 491; *Rothwell v. Rothwell*, 2 Sim. & Stu. 218; *Costeker v. Horrox*, 3 Y. & Coll. 530; *Toulmin v. Copland*, Ib. 625; *White v. Barton*, 18 Beav. 192.

(*m*) *Richardson v. Bank of England*, 4 My. & Cr. 174, 175, by Lord Cottenham.

(*n*) 4 My. & Cr. 176, 177; *Meyer v.*

Money admitted by the executor to be in the hands of his partner is in his own hands for the purpose of being ordered to be paid into court. (*o*)

Where the executor admits that a certain amount of assets has come to his possession, he may discharge himself from the payment of it into court, wholly or partially, by taking credit for sums which he shows a right to retain for his own debt, due from the testator, (*p*) or to have allowed him on any just grounds, or which are undisputed. (*q*) Where an executor admits that he has received * a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify, the court will allow him to verify the amount of his payments, by affidavit, and order him, on motion, to pay the balance into court. (*r*)

But when there is a sufficient admission by the executor of assets once come to his hands, he cannot relieve himself from paying them into court by showing any unauthorized application of them, or any investment or disposition of them which in substance amounts to a breach of his duty as executor. (*s*)

In *Freeman v. Fairlie*, (*t*) it was held that an admission by an executor that the whole amount of the property was near 40,000*l.*, and that the whole was invested in India on public securities, either in his name, or in the name of the house in which he was a partner, but subject to his disposal, unless some part was in the hands of the said house at interest, which he believed might be the case, was not a sufficient admission of money in his hands to order the payment into court of any part of it; for that though an executor dealing with money in his hands was bound to earmark it, yet, if he did not, and could not answer as to the state of it, the court had no power to act as upon an admission. But in *Roy v. Gibbon*, (*u*) it was said by Wigram V. C. that the rule

Montrion, 4 Beav. 343; *Scott v. Wheeler*, 12 Beav. 366.

(*o*) *Johnston v. Aston*, 1 Sim. & Stu. 73; *White v. Barton*, 18 Beav. 192.

(*p*) *Middleton v. Poole*, 2 Coll. 246.

(*q*) *Roy v. Gibbon*, 4 Hare, 65; *Nokes v. Seppings*, 2 Phill. 19.

(*r*) *Anon.* 4 Sim. 359. See, also, *Proudfoot v. Hume*, 4 Beav. 477, per Lord Langdale.

(*s*) *Wyatt v. Sharratt*, 3 Beav. 498; *Hinde v. Blake*, 4 Beav. 597; *Score v. Ford*, 7 Beav. 333; *Roy v. Gibbon*, 4 Hare, 65; *Ingle v. Partridge*, 32 Beav. 661; or by setting up the adverse title of a third party; *Lord v. Purchase*, 17 Beav. 171.

(*t*) 3 Meriv. 39.

(*u*) 4 Hare, 65.

was, perhaps, less strict at the present day than it was stated in *Freeman v. Fairlie*; and that the practice now was, that where a party charged himself with the receipt of a fund, he was bound by that charge till he had relieved himself from it by showing a proper application of the money; and that it was not enough for him whose duty it * was to know the truth and be ready with information, to leave the application in doubt, by merely expressing ignorance with regard to the charges to which the fund was liable. (x)

If there is no danger of the property being lost, from the executor being an insolvent or otherwise, a reasonable time will be allowed for bringing the fund into court; and a longer time will be allowed when the money is in a foreign country. (y) And if the assets appear to have been invested on an improper security, time will be allowed (which may, in a proper case, be extended from time to time) to enable the executor to realize the security. (z) And in fixing the day for payment time will be allowed for the trustee, if he desires it, to show that no reason exists for calling the money into court. (a)

The relief on a motion of this kind will be confined to the payment of money into court, and the court will not direct any permanent relief, such as the repurchase of stock which had been sold by the executor; for that can be done only at the hearing of the cause. (b)

Though a receiver may have been appointed during a litigation in the ecclesiastical court respecting the validity of a will, the court of equity will not, on that account alone, order the person named as executor to pay into court money in his hands belonging to the testator's estate received previously to the appointment of the receiver. (c)

The general rule as to payment of money into court is, that the plaintiffs must be solely entitled, or have such an interest jointly with others as to entitle them, on behalf * of themselves and of those others, to have the fund secured. (d)

(x) See, also, *Hinde v. Blake*, 4 Beav. 597.

(y) *Roy v. Gibbon*, 4 Hare, 65.

(z) *Score v. Ford*, 7 Beav. 333; 3 Beav. 498; 4 Beav. 599.

(a) *Hill on Trustees*, 571; *Hinde v. Blake*, 4 Beav. 599.

(b) *Futter v. Jackson*, 6 Beav. 424; *Hill on Trustees*, 570.

(c) *Reed v. Harris*, 7 Sim. 639; *Edwards v. Edwards*, 10 Hare App. II. lxiii.

(d) 3 Meriv. 29. Where part of a residuary estate has been invested on an

An executor, having been ordered to pay money into court, is not thereby deprived of his right of retainer, (*e*) nor of his lien on the fund for his costs. (*f*)

The general rule as to papers and writings is, that an executor representing an estate should deposit them, for the ^{Production of papers, &c.} benefit of the parties interested, in the office of the clerk of records and writs, in whose division the cause is, unless there are other purposes which require that he should retain them in his own hands. (*g*) But where the production of documents is required, the application for it must in all cases be made by summons at chambers, and the party required to produce will then be ordered to file an affidavit, stating what documents he has, or has had, in his possession or power relating to the matters in question, and to produce and leave the same (excepting such as he may by his affidavit object to produce) with the clerk of records and writs. (*h*)

It may here be observed, that it is the bounden duty of an executor to keep clear and distinct accounts of the property which he is bound to administer. If, therefore, he chooses to mix the accounts with those of his own trading concerns, he cannot thereby protect himself from producing the original books, in which any part of those accounts may be inserted. *It is a more difficult question, as between an executor, bound to produce, and his partner in trade; but if the partners have *permitted* him to mix the accounts, it seems they cannot afterwards object to the production. Clearly so, in a case where the executor has admitted the having lent to the house part of the trust property, and that they have been dealing with it. (*i*)

Accordingly, in *Freeman v. Fairlie*, (*k*) an executor in India, improper security, and the defendant has an interest therein, the court, on being satisfied that there is no existing claim on the estate, sometimes confines the amount to be paid into court to the share of the plaintiff. *Score v. Ford*, 7 Beav. 333.

(*e*) *Ante*, 1040.

(*f*) *Blenkinsop v. Foster*, 3 Y. & Coll. 207, *coram* Alderson B.

(*g*) *Freeman v. Fairlie*, 3 Meriv. 30.

(*h*) See 15 & 16 Vict. c. 86, sects. 18, 20, and Cons. Orders, 42, rule 3. See, also, *Rochdale Canal Company v. King*, 15 Beav. 11. *Primâ facie* evidence in sup-

port of a claim will entitle a creditor in an administration suit to an order directing the executors to file an affidavit as to their possession of documents relating to the claim, or to any item in it. *Re McVeagh*, 1 De G., J. & S. 399.

(*i*) 3 Meriv. 43, 44. The court, however, will not order a defendant, who has a joint possession of a document with some one else not before the court, to produce the document itself. *Taylor v. Rundell*, Cr. & Ph. 111.

(*k*) 3 Meriv. 44.

coming to England, and after twenty-one years, being called upon to account, alleging that he had left his books, &c. behind him in India, was ordered to produce copies of all entries in such books, &c. within six months, though it was impossible he could do so, in order that the court might have an opportunity from time to time of seeing that he had used proper diligence.

If the plaintiff's demand be uncontested or proved, and the executor admits assets, the plaintiff is entitled to immediate payment without taking the accounts. (*l*) And it may be further observed, that where a bill has been filed, the same doctrine prevails though the executor denies assets in hand at the time of filing his answer, if he also discloses that he had at one time sufficient assets, but that he has since misapplied them. (*m*) An admission of assets for the payment of a legacy is an admission of assets for the purposes * of the suit, and extends to costs, if the court think fit to give them. (*n*)

When the court will decree payment of the plaintiff's demand without first decreeing an account:

Again, if a bill charges that the executor has rendered himself personally liable to pay the plaintiff's debt or legacy by an admission of assets made before suit, or by any other means, and the plaintiff can sustain this allegation, he will entitle himself to a decree for payment at once. (*o*) And the general rule is, that an admission of assets by an executor or administrator can never be retracted in a court of equity, unless a case of mistake be most clearly established. (*p*)

where the executor has made himself personally liable by admitting assets, &c.

(*l*) *Woodgate v. Field*, 2 Hare, 211. Where the answer admitted assets, but insisted that, under the circumstances stated, the legacy sought to be recovered had been paid, it was held that the plaintiff had a right to read the passage admitting the assets, without reading that as to the payment of the legacy. *Conop v. Hayward*, 1 Y. & Coll. C. C. 33. An admission of assets by the executor's answer is waived by the plaintiff's going on to an account of assets, and procuring a receiver to be appointed. *Wall v. Bushby*, 1 Bro. C. C. 484.

count may be decreed against the rest. *Norton v. Turvil*, 2 P. Wms. 145. Where, in an examination put in by two executors, it was stated that their receipts had been joint, but it appeared by affidavit that that statement was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing, liberty was given to him to put in a supplemental affidavit to correct the mistake. *Hewes v. Hewes*, 4 Sim. 1.

(*m*) *Rogers v. Soutten*, 2 Keen, 598.

(*n*) *Philanthropic Society v. Hobson*, 2 My. & K. 357. If there are several executors, and some admit assets, yet an ac-

(*o*) *Barnard v. Pumfret*, 5 My. & Cr. 63; *Dimsdale v. Dudding*, 1 Y. & Coll. C. C. 265.

(*p*) *Drewry v. Thacker*, 3 Swanst. 548; *Roberts v. Roberts*, cited 1 Bro. C. C. 487; S. C. 2 Dick. 573.

If, however, a strong case be made out, this may enable the court to relieve him from the admission ; (q) as if the money were in a banker's hands, who fails. But the executor or administrator must clearly prove the mistake, and show that the circumstance, on which he built his admission, failed. (r)

The admission of assets by an executor will not preclude creditors from coming on a fund specifically appropriated for their benefit, although that fund may have been disposed of to a purchaser. (s)

With respect to what shall amount to an admission of assets, What is an admission of assets. it was held in a case, (t) where the deceased gave money upon mortgage to a charity in Ireland, that his executrix, * by her own will attempting to provide other means for payment of that legacy, and stating as a reason that his personal estate was out on mortgage, thereby admitted assets of her testator. (u) Payment of interest for a legacy by the executor, from time to time, will be evidence of assets, though a single instance of payment of interest will not. (x) So where executors from time to time had made some payments on account of principal and interest on a legacy, and, about nine years after the testator's death, passed their accounts at the legacy duty office, showing a considerable residue ; Lord Langdale held that the legatee was entitled to an immediate decree for payment of the legacy, without first taking an account of the testator's estate. (y)

(q) See *Foster v. Foster*, 2 Bro. C. C. 619 ; *Young v. Walter*, 9 Ves. 365.

(r) *Horsley v. Challoner*, 2 Ves. sen. 85, *infra*, 2052.

(s) *Curtis v. Blow*, 2 B. & Ad. 426.

(t) *Campbell v. Lord Radnor*, 1 Bro. C. C. 271 ; 5 My. & Cr. 70.

(u) See, also, *Elliott v. Holwell*, 1 Cas. temp. Lee, 574.

(x) *Corporation of Clergymen's Sons v. Swainson*, 1 Ves. sen. 75 ; 5 My. & Cr. 70, by Lord Cottenham ; *Atty. Gen. v. Chapman*, 3 Beav. 255 ; *Atty. Gen. v. Higham*, 2 Y. & Coll. C. C. 634. But payment of the interest of a specific or demonstrative legacy, when that payment is clearly not made out of the general assets, nor a payment referable to the general assets, is not an admission of general assets. *Severs v. Severs*, 1 Sm. & G. 400.

Executors having invested an infant's legacy in their partnership concern, it was held that the entry by them in the partnership books of the amount of the legacy to the credit of the legatee was a sufficient admission of assets, there being no evidence that the entries were mistaken, and the course of conduct observed being consistent with them. *Townend v. Townend*, 1 Giff. 201. For an instance in which a similar entry was held not to amount to an admission of assets, see *Hutton v. Rositer*, 7 De G., M. & G. 9.

(y) *Whittle v. Henning*, 2 Beav. 396. See, further, as to admission of assets by having given a legatee the legacy office receipt for duty on the legacy, *Lazonby v. Rawson*, 2 Sm. & G. 267 ; 4 De G., M. & G. 556, S. C.

But in *Postlethwaite v. Mounsey*, (z) it was held by Wigram V. C. that payment by the executor of the interest of a legacy to the tenant for life under the will was not conclusive as an admission of assets by the executor; but that such payment might be explained as having been made by mistake, or for other reasons or causes; and that in that * case the usual account of assets might be directed. And his honor observed, that it would be difficult to hold that the payment of one legacy would, of itself, bind the executor to pay all the legacies given by the will. Suppose a case in which small legacies were given to servants, and the executor chose, on his own responsibility, to pay those legacies at once, without reference to the state of the assets, it would be hard to say that he had thereby conclusively bound himself to pay all the legacies given by the will. In the subsequent case of *Savage v. Lane*, (a) the same learned judge held, that, at all events, where the bill in a creditor's suit does not specifically charge the executor with having made himself personally liable, but prays that an account may be taken and the estate administered, the executor's admission in his answer, that he has paid certain legacies, is not such an admission of assets as to entitle the plaintiff to a decree without taking the account.

The general rule, however, is that an admission of assets by the executor to one claimant on them is an admission to all. (b)

In *Holland v. Clark*, (c) Sarah Clark bequeathed a legacy of 150*l.* to Susannah C., when she should attain 21. The testatrix died in 1811, and the legatee did not attain 21 till several years afterwards, and she then married. In 1825 the executors signed and gave to her husband this memorandum: "We separately and jointly acknowledge to owe to George Holland the sum of 150*l.*, being a legacy left to his wife by the late Sarah Clark, and 50*l.* interest thereon." And it was held by Knight Bruce V. C. that, under the circumstances, this memorandum amounted to an admission of assets by the executors.

The authorities as to the probate stamp being admissible, and its effect in evidence as to the amount of assets, have already been examined. (d)

(z) 6 Hare, 33, note (a). See, also, *Cr. 70*, by Lord Cottenham. [See *Moorhead's Appeal*, 32 Penn. St. 297.]

(a) 6 Hare, 32.

(c) 2 Y. & Coll. C. C. 319 conf.;

(b) *Cook v. Martyn*, 2 Atk. 2; 5 My. & Stephens v. Venables, 31 Beav. 124.

(d) See *ante*, 1969.

* It only remains to be noticed that an admission is always susceptible of explanation. Thus, in *Payne v. Little*, (*e*) Romilly M. R. observed, that every admission of assets made by an executor, whether it be made by his acts or by an express admission in words, must have reference to the circumstances which he was then acquainted with, and if "the circumstances on which he built his admission fail him" (an expression used by Sir John Strange in *Horsley v. Chaloner* (*f*)), then the admission fails also, and he cannot be bound by an admission made under circumstances with which he was not acquainted.

If an executor changes the nature of the testator's estate, the Remedy for devastavit. general rule is, that this is a conversion; and as money has no ear-mark, it cannot be followed; but the executor by such transactions has made himself liable to a *devastavit*, (*g*) for which the party injured must seek satisfaction out of the executor's own effects. (*h*) If an executor purchases estates with the assets, and takes the conveyance in his own name, without the trust appearing on the face of the deeds, the estate will not be liable to the trusts, although he die insolvent, unless the application of the purchase-money can be clearly improved. (*i*)

But if an executor, for the benefit of the testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, but it may still be followed, as much as if it had continued in the same condition as at the testator's death. (*k*)

The general question, as to the right of creditors and legatees to follow the assets into the hands of the person to whom the executor has aliened them, has been investigated in a former part of this work. (*l*)

* In *Skinner v. Sweet*, (*m*) it appeared that an executrix, in respect of her receipt as such, was considerably indebted to the estate, and that she had an annuity of 250*l.* given to her by the will. Sir John Leach V. C. directed that her annuity, as it be-

(*e*) 22 Beav. 69.

(*f*) 2 Ves. sen. 83.

(*g*) *Waite v. Whorwood*, 2 Atk. 159.

(*h*) *Charlton v. Low*, 3 P. Wms. 330.

(*i*) 2 Sugd. V. & P. 148, 9th ed.

See *Kendar v. Milward*, 2 Vern. 440;

Kirk v. Webb, Prec. Chanc. 84; *Deg v.*

Deg, 2 P. Wms. 414, 415; *Ryall v. Ry-*

all, 1 Atk. 59; *Wilkins v. Stevens*, 1 Y. & Coll. 431.

(*k*) 2 Atk. 159.

(*l*) *Ante*, 932 *et seq.* See, also, *Downes*

v. Power, 2 Ball & Beat. 491; *Silver v.*

Stein, 1 Drew. 295; *Collinson v. Lister*,

20 Beav. 356.

(*m*) 3 Madd. 244.

came due, should be applied in payment of the debt due to the estate, with liberty to apply to the court when the debt due to the estate should be discharged. So where an executor assigns his reversionary legacy, the assignee takes it subject to the equities which attached to the executor; and therefore, if the executor, though subsequently to the assignment, wastes the testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust. (*n*)

The party injured by a *devastavit* is but a simple contract creditor of the executor, (*o*) and the claim is consequently barred after the lapse of six years by the statute of limitations. (*p*)

In *Geary v. Beaumont*, (*q*) a specific legacy was given to an executor, who afterwards became bankrupt, and committed a *devastavit*. The subject of the specific bequest was sold by his assignees; and Sir W. Grant held that the produce in their hands was not specifically liable to make good the *devastavit*, in favor of the parties beneficially entitled under the will, but that such parties were only entitled to prove to the amount of the *devastavit*. Bankrupt or insolvent executor.

If an executor becomes bankrupt, having wasted the assets, the *devastavit* might have been proved under the commission. (*r*) In *Ex parte Moody*, (*s*) it was holden that an executor and trustee, having committed a *devastavit*, was precluded from proving under his own bankruptcy. And *liberty to do so was given (in the first instance, and without previous application to the commissioners) to a legatee, on behalf of himself and others, with a direction that the dividends should be paid into the bank, in trust in the matter. (*t*)

In the case of an executor committing a *devastavit*, and a decree for payment of the amount, the debt is considered as due from the time of the *devastavit*, and not from the date of the

(*n*) *Morris v. Livie*, 1 Y. & Coll. C. C. 380; *ante*, 1404. See, also, *Barnett v. Sheffield*, 1 De G., M. & G. 371.

(*o*) *Charlton v. Low*, 3 P. Wms. 331.

(*p*) *Thorne v. Kerr*, 2 Kay & J. 54.

(*q*) 3 Meriv. 431.

(*r*) *Toller*, 429.

(*s*) 2 Rose, 413.

(*t*) See *Ex parte Colman*, 2 D. & Ch. 584. Where the bankrupt is one of several executors, and has before his bank-

ruptcy received a part of the assets, the other executors may prove the amount against his estate. *Ex parte Brown*, 1 D. & Ch. 118; *Ex parte Phillips*, 2 Deac. 334. Generally speaking the bankrupt himself may prove upon his own estate for a debt due to him, as sole executor, upon obtaining an order to that effect from the court. *Ex parte Shaw*, 1 Glyn & Jam. 127; *Ex parte Wyatt*, 2 D. & Ch. 211.

decree; and therefore, where a person was committed under an attachment for breach of a writ of execution of a decree for payment of money on account of a *devastavit*, it was held that as he had, between the time of the *devastavit* and the date of the decree, taken the benefit of the insolvent debtors' act, and had been ordered to be discharged by the court of quarter sessions, he might be brought up on a *habeas corpus* before the chancellor, and discharged. (u) Again, the certificate of a bankrupt executor discharges an attachment against him for breach of an order to pay a sum of money, part of the personal estate, found to be in his hands. (v)

By stat. 13 & 14 Vict. c. 60 (the trustee act), repealing stat. 11 Geo. 4 and 1 W. 4, c. 60, the lord chancellor (s. 3) is empowered to make orders for the vesting of the lands of lunatic trustees and mortgagees in such person or persons, and in such manner and for such estate, as he shall direct; (s. 4) and to make orders releasing or disposing * of contingent rights in lands to which such lunatic trustees or mortgagees shall be entitled. He is also empowered (s. 5) to make orders vesting the right to transfer stock or to sue for and recover any chose in action to which a lunatic trustee or mortgagee may be solely or jointly entitled; (s. 6) or to transfer stock standing in the name of a deceased person, *whose personal representative is a lunatic or person of unsound mind*, or to sue for and recover a chose in action vested in any such lunatic as the personal representative of a deceased person. (x)

And the same act (the provisions of which are extended by stat. 15 & 16 Vict. c. 55) enables the court of chancery (ss. 7, 8, 9, 10, 11, 12) to make orders vesting the estates, and releasing or disposing of the contingent rights of infant trustees and mortgagees, or of trustees out of the jurisdiction of the court. It further empowers the court (s. 13) to make orders for the vesting of lands when it is uncertain which of several trustees was the survivor, or (s. 14) whether the last trustee be

(u) *Wheldale v. Wheldale*, 16 Ves. 376; *Mont. & A.* 562, that an executor cannot be called on to account for money which

(v) *Wall v. Atkinson*, Cooper, 198; *S. C.* 2 Rose, 196. See, also, *Walcott v. Hall*, 2 Bro. C. C. 305; *Ex parte Holt*, 2

might have been proved under his commission.

(x) *In re White*, L. R. 5 Ch. App. 698.

living or dead ; and (s. 15) in cases where the trustee has died without an heir, and (s. 16) to release lands from the contingent rights of unborn trustees or vest them ; and (15 & 16 Vict. c. 55, s. 2, repealing 17th and 18th sections of the trustee act) in case of the refusal or neglect of a trustee to convey or release, to make an order for vesting the estate ; whilst by sect. 20 of the trustee act it is provided, that in every case where the lord chancellor or the court of chancery shall be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the lord chancellor or the court of chancery, as the case may be, should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right.

Similar powers of making orders vesting a right to * transfer or recover are by these acts given to the court of chancery (13 & 14 Vict. c. 60, s. 22) in cases where the trustees of any stock or chose in action are out of the jurisdiction of the court, or cannot be found, or concerning whom it is uncertain whether they be living or dead, or (15 & 16 Vict. c. 35, s. 3) in the case of an infant solely or jointly entitled to any stock upon any trust ; whilst (15 & 16 Vict. c. 55, s. 4, altering sects. 23 and 24 of trustee act) if any person shall neglect or refuse to transfer any stock or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the court of chancery for that purpose shall have been served upon him, it shall be lawful for the court of chancery to make an order vesting the right to transfer or recover in such person as the court shall appoint ; and on like refusal or neglect of an executor in respect of the transfer of stock standing in the sole name of a deceased person, a similar order may be made.

By the 6th and 7th sections of 15 & 16 Vict. c. 55 (extending the provisions of the 26th section of the trustee act), the bank of England, and all companies and associations whatever, are ordered to obey such orders ; and every order so made is declared to be an indemnity to the bank and to all companies so obeying.

Bank of
England,
&c. must
obey or-
ders, and
will be in-
demnified.

By the interpretation clause of the trustee act, " The word

'trust' shall not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, the word Interpretation clause. 'trust' and 'trustee' shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person."

* CHAPTER THE THIRD.

OF REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN
THE COURT OF PROBATE.

It has been shown, in an earlier stage of this treatise, that an executor, upon making probate, as well as administrator on taking out letters of administration, makes oath that he will (amongst other things) render a true and just account of the estate and effects of the deceased whenever required by law so to do; (a) and that an administrator under the court of probate act must give bond conditioned (*inter alia*) to "make a true and just account of his administration" whenever required by law so to do. (b)

Of compelling the executor, &c. to account.

However, it is said that neither an executor nor administrator can be cited by the court of probate *ex officio* to account; (c)

(a) *Ante*, 325, 453, 456.

(b) *Ante*, 532. [In Connecticut this accounting must be done in the probate court, and that is the only place where it can be done in the state. *Brush v. Button*, 36 Conn. 292; *Bacon v. Fairman*, 6 Conn. 121; *Pitkin v. Pitkin*, 7 Conn. 315; *Bailey v. Strong*, 8 Conn. 278; *Wattles v. Hyde*, 9 Conn. 10; *Beach v. Norton*, 9 Conn. 182; *Cowles v. Whitman*, 10 Conn. 121; *Atwater v. Bruce*, 21 Conn. 237. An executor's account cannot be settled in a suit on the probate bond. *Brush v. Bacon*, 36 Conn. 292. See *Judge of Probate v. Adams*, 49 N. H. 150; *Coffin v. Jones*, 5 Pick. 61; *Prescott v. Parker*, 14 Mass. 429; *Adams v. Adams*, 16 Vt. 228. In Vermont the condition of the bond being that executors will "well and truly administer according to law, and out of the estate pay and discharge all debts, legacies, and charges chargeable therein, or such dividends as shall be ordered and

decreed to be paid by said court," &c. in usual form, it is held that they cannot be charged by suit with a breach of the bond in respect to paying legacies, until there shall have been an order and decree of the probate court to that effect, and failure to comply therewith. *Probate Court v. Kimball*, 42 Vt. 320. So in New Jersey, *The Ordinary v. Barcalow*, 7 Vroom, 15. The same rule obtains as to a suit on the bond of administrators for non-payment of a distributive share. *Ante*, 534, note (g²), 540, note (g).]

(c) *Toller*, 491; *Archbishop of Canterbury v. Wills*, 1 Salk. 315, 316; stat. 1 Jac. 2, c. 17. The ordinary, said Lord Hardwicke, after an administrator has exhibited an inventory, cannot compel the administrator to account, but it must be *ad instantiam partis*, and, therefore, the inventory and account are, as to the ordinary, the same thing. *Greenside v. Benson*, 3 Atk. 253.

though the executor or administrator may be compelled to exhibit an inventory, and render an account of his administration of the personal estate of his testator or intestate in that court, at the instance of a legatee or next of kin, or of a creditor. Accordingly, it was held in *Wainford v. Barker*, (*d*) that a debt, on which the statute of limitations had attached, would enable a creditor to compel the administrator to account before the ordinary; for it is a debt, though barrable by pleading the statute of limitations. (*e*) And there has already been occasion, in *treating of the subject of inventories, to adduce several instances which prove that an executor or administrator is compellable to render an account before the court of probate at the prayer of any person having an interest, or even the *appearance* of an interest. (*f*) In the same part of this work may be found collected some authorities upon other questions connected with this subject, viz, after what lapse of time an account may be sued, (*g*) and also what persons are compellable to render an account. (*h*)

The creditors and legatees, and all other parties having an interest, must be cited to be present at the making of the account; otherwise the account made in their absence will not bind them. (*i*) Therefore the executor or administrator, when called upon by any one party to render an account, ought to cite the next of kin in special, and all others in general, having or pretending to have an interest in the goods of the deceased, to be present, if they think fit, at the rendering and passing of the account; and then, on their appearance, or contumacy in not appearing, the judge shall proceed, and the account thus determined will be final. (*k*)

If a party having an interest call upon the executor or administrator to exhibit an inventory of the effects, and to render an account of his administration thereof, the executor or administra-

(*d*) 1 Ld. Raym. 232.

(*e*) See, also, *Philipson v. Harvey*, 2 Cas. temp. Lee, 344.

(*f*) *Ante*, 975, 976. A party having an interest, who prays an account, shall not be condemned in costs, unless he makes objections to it, which he fails to substantiate. 4 Burn E. L. 429, 8th ed.

(*g*) *Ante*, 978.

(*h*) *Ante*, 979.

(*i*) 4 Burn E. L. 487, 8th ed.

(*k*) 4 Burn E. L. 487, 8th ed.; Toller,

494. In *Penvill v. Luscombe*, 2 Jac. & W. 201 (Appendix to *Cholmondeley v. Clinton*), a plea by an administrator *durante minore etate*, to a bill for an account, of a suit by the executor for the same purpose in the spiritual court, and sentence, was allowed as a stated account, with liberty to except as to subsequent receipts, and an issue directed as to the payment of a particular sum.

tor is bound personally to exhibit * such inventory and account, and (if the adverse party demand it) to take a corporal oath of the truth thereof, notwithstanding that, at another time, perhaps, an inventory has been exhibited *ex officio mero* of the judge, in the absence of the party, and an account given upon oath. (*l*)

And this inventory is not to be exhibited under protestation, as when an inventory is exhibited in common form, and not at the instance of the party, but absolutely, and directly, for a full, true, and perfect inventory of all and every the goods of the deceased which have come to the said accountant's hands since the death of the deceased. And if he shall exhibit a false or imperfect inventory, or account, upon his said oath, he shall be guilty of perjury. (*m*)

There has already been occasion to consider the proper form and contents of the inventory. It may here be added, Form of inventory and declaration in lieu thereof. that it has become usual in practice in common form business to accept a declaration, which differs from an inventory only in this, that instead of each specific article being separately enumerated, the effects are grouped *in masses*. (*n*) In contentious proceedings, however, by rule 76 (contentious business), inventories and not merely declarations are to be used, unless otherwise ordered by the judge or a registrar. (*o*)

Where the citation to account is by a legatee or next of kin, he may disprove or object against the account; (*p*) and the executor shall make due proof of every payment. (*q*) Where the sum is under 40s., the payment shall be proved by his oath, if there appear no fraud by dividing greater sums into less. (*r*) But of the payment of sums to a higher amount, vouchers must also be exhibited. (*s*) And after the death of the executor or administrator, sums under 40s. * shall not be allowed on the oath of his representative, for such payments can be substantiated only by him who made them. (*t*)

(*l*) 4 Burn E. L. 487, 8th ed.

(*m*) 4 Burn E. L. 488, 8th ed.

(*n*) Practice by Dodd and Brookes, 560, 561. [An executor's account rendered in a probate court for settlement is in the nature of a declaration in a writ; he can be allowed for no sum larger than is charged either in the probate court or on appeal. *Pettingill v. Pettingill*, 64 Maine, 350.]

(*o*) Ib.

(*p*) Ib.

(*q*) Ib.

(*r*) Ib.

(*s*) Ib. [See *Elmore v. Jaques*, 60 N. Y. 610.]

(*t*) Ib.; *Toller*, 492.

suing for an account in the court of probate is to gain some insight into the state of the fund previous to his proceeding in an action at common law. But a bill in equity for the discovery of assets is the more usual course adopted for that purpose. (a)

Although one creditor may have proceeded against the executor or administrator in the court of chancery, another creditor, who is no party to the chancery cause, may call on the executor to give in an inventory in the court of probate. (b) But where a creditor, or next of kin, or legatee, files a bill in chancery, and also prays an inventory in the court of probate, the latter will oblige him to make his option which court he will proceed in; because it is unjust that the executor or administrator should be harassed in both courts by the same person for the same thing. (c) Accordingly, where a creditor filed a bill in chancery for the discovery of the assets of a deceased, and then cited his executor to give an inventory in the prerogative court, having also, previously to filing the bill, cited the executor to bring in an inventory and to take pro-

ministrator, in order to protect himself from liability to account a second time for the same matter, should specify the subjects in regard to which he settles his account; and the decree of the court upon such specific subject will be conclusive against all parties unless affected by fraud. *Field v. Hitchcock*, 14 Pick. 405; *Blake v. Pegram*, 101 Mass. 592, 598, 599. To give to the settlement of an account the force and character of *res adjudicata* as to any particular item, it must appear that the item was in issue, or in some form submitted to the court for determination. *Blake v. Pegram*, 101 Mass. 592, 598, 599; *Saxton v. Chamberlain*, 6 Pick. 422; *Field v. Hitchcock*, 14 Pick. 405; *Wiggin v. Swett*, 6 Met. 194; *Leslie's Appeal*, 63 Penn. St. 355; *Sherman v. Chace*, 9 R. I. 166. As to the time within which an executor's or administrator's account may be opened and reëxamined, it was held in *Child's Appeal*, 23 N. H. 225, that this could not be done after the lapse of over twenty years from the time of the rendition of the account. In this case no fraud or misconduct was alleged. But where the settlement of the account was affected with fraud, it was held that the supreme

court of probate will open it, though final and of twenty years' standing. *Davis v. Cowdin*, 20 Pick. 510. Such an account cannot, however, be opened upon a bill in equity, even for fraud or other misconduct. *Sever v. Russell*, 4 Cush. 513; *Jennison v. Hapgood*, 7 Pick. 1, 7. As to opening a final accounting of executors for reëxamination, in a court of probate, to the extent of correcting specified errors, apparent on the face of the account, see *Decker v. Elmwood*, 1 Thomp. & C. (N. Y.) 48; *Mix's Appeal*, 35 Conn. 121; *Sherman v. Chace*, 9 R. I. 166; *Stetson v. Bass*, 9 Pick. 27. An executor or administrator can be discharged of his trust only by removal, resignation, or death. No discharge upon final accounting and settlement, even under a decree of a probate court, can avail him against an action to recover a debt due and owing by his testator's estate at and after the date of such final settlement. *Pollock v. Buie*, 43 Miss. 140.]

(a) *Toller*, 495.

(b) *Lloyd v. Beatniffe*, 2 Cas. temp. Lee, 561.

(c) By Sir George Lee, in *Brotherton v. Hellyer*, 2 Cas. temp. Lee, 134.

bate; Sir George Lee held that the creditor must be considered as having deserted the prerogative court where he had originally begun, and made his option to proceed in chancery; so that he could not revert to the prerogative while the suit in equity was depending. And this petition was rejected with costs. (*d*)

With respect to legatees and next of kin, they might formerly proceed against the executor or administrator in the ecclesiastical court to recover their legacies, or distributive shares under the statute. (*e*)

Suit for a legacy.

Indeed, in respect of legacies, the cognizance of them in former times belonged exclusively to the ecclesiastical jurisdiction; * the court of chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees. (*f*)

But it is provided by the court of probate act (20 & 21 Vict. c. 77, s. 23) that the court of probate, to which the jurisdiction of the ecclesiastical courts has been transferred, shall entertain no suit for legacies. (*g*)

20 & 21 Vict. c. 77, s. 23: no suits for legacies to be entertained by the court of probate.

According to the statute of distributions, the ecclesiastical court had authority to enforce the distribution of an intestate's effects. And as the act of parliament contains no negative words, equity had, in this matter also, a concurrent jurisdiction with the ordinary. (*h*)

Suit by next of kin for a distribution.

But now it is provided by the court of probate act (20 & 21 Vict. c. 77, s. 23), that the court of probate, to which the jurisdiction of the ecclesiastical court has been transferred, shall entertain no suits for the distribution of residue. (*i*)

20 & 21 Vict. c. 77, s. 23, no suits for distribution of residues to be entertained by the court of probate.

The ecclesiastical court could not entertain a suit for proctor's fees; since they are a temporal duty, for which an action may be maintained in the temporal courts. (*k*)

Proctor's fees.

(*d*) *Pearson v. Gamon*, 2 Cas. temp. Lee, 268.

(*e*) *Glen v. Webster*, 2 Cas. temp. Lee, 31.

(*f*) *Deeks v. Strutt*, 5 T. R. 692.

(*g*) See *ante*, vol. i. 292.

(*h*) *Matthews v. Newby*, 1 Vern. 133; Fonbl. Treat. Eq. bk. 4, pt. 2, ch. 3, s. 2, note (*d*).

(*i*) See *ante*, vol. i. 292. [In the case of *Cowdin v. Perry*, 11 Pick. 503, 511, 512, Shaw C. J. said: "But the question to whom and at what time, a legacy or distributive portion under a will, is to be paid by an executor, is one of which the judge of probate has no jurisdiction. Any decree directing the executor to pay or not to pay a legacy to any particular person, or

(*k*) *Pollard v. Gerard*, 1 Ld. Raym. 703; S. C. 1 Salk. 333; *Johnson v. Oxenden*, 4 Mod. 255; *Toller*, 496.

at what time a legacy should be paid, whether made upon or without notice, would be extra-judicial, and would afford the executor no justification. It is difficult to conceive how a subsequent ratification or allowance of a payment already made, can be of any greater force and effect." (See Tenney J. in *Smith v. Lambert*, 30 Maine, 137, 145.) "The object of such accounting by the executor, before the judge, is to show that he has paid according to his charges, and upon producing proof of the fact of payment, such charge is allowed. But whether such payment is rightful, is a question for which the executor himself stands responsible. To hold that an allowance of a payment in account, under such circumstances, would bar a legatee whose legacy is not yet payable, would be pressing the doctrine of *res judicata* beyond all reasonable limits." In *Williams v. Cushing*, 34 Maine, 370, 375, Appleton J. said: "The decree of the judge of probate upon all matters within his jurisdiction is final unless vacated by appeal. As to matters without his jurisdiction it is null and void. It is no part of his duty to settle the legal construction of a will, to determine, in case of different claimants, to whom payment should be made, or, when the amount is contested, what the sum shall be. All these questions belong to another tribunal. The executor might await the legal decision of controverted right, or he might, on his own responsibility, decide for himself." The probate court, in Massachusetts, has no authority over the distribution of the residuary legacies. The relative rights of the legatees, and other questions affecting such distribution, cannot properly be heard upon the settlement of the executor's account. For the same reason, the executor should not be allowed for their payment in his account, since the effect of

such allowance, if any effect can be given to it, would be to prejudice the rights of those who should claim a larger share than had been paid to them. The settlement of the account should determine the amount of residue subject to distribution, but not the rights or shares of those who are entitled. Wells J. in *Granger v. Bassett*, 98 Mass. 462, 469. Probate courts in Massachusetts, concurrently with the supreme judicial court, have jurisdiction to hear and determine in equity certain matters in relation to trusts created by will. Genl. Sts. c. 100, § 22. This jurisdiction has since been extended to the hearing and determination of all matters arising under wills, in the same manner as in relation to trusts created by will. St. Mass. 1873, c. 224, § 3. As to Connecticut, in *Vail's Appeal*, 37 Conn. 185, 195, Butler C. J. said: "The judge of probate is not a chancellor. He possesses chancery powers, but they are only such as are incidental, connected with the settlement of a particular estate, and necessary for the adjustment of equitable rights, and not to find and enforce equities, in the ordinary and loose sense in which that term has come to be used in the law. If there are trusts connected with the property, or liens upon it, or priorities enforceable in equity, — if through fraud, accident, or mistake a class of creditors or beneficiaries are entitled of right to relief as against other creditors or beneficiaries, he may marshal or distribute the assets so as to enforce or satisfy the right. But it must be right — one which a court of equity would take cognizance of and enforce, if application could be made to such court." See *Hotchkiss v. Beach*, 10 Conn. 232; *Peck v. Harrison*, 23 Conn. 118 *Ashmead's Appeal*, 27 Conn. 241.]

*CHAPTER THE FOURTH.

OF EQUITABLE REMEDIES AGAINST EXECUTORS AND ADMINISTRATORS IN THE COUNTY COURT.

By stat. 28 & 29 Vict. c. 99, s. 1, it is enacted that the county courts shall have and exercise all the power and authority of the high court of chancery in the suits or matters hereinafter mentioned ; that is to say, —

1. In all suits by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law, or next of kin, in which the personal or real or personal and real estate against or for an account or administration of which the demand may be made shall not exceed in amount or value the sum of five hundred pounds.

The act then proceeds to enumerate other suits and matters, and then gives the county courts equitable jurisdiction —

- “In all proceedings for orders in the nature of injunctions, where the same are requisite for granting relief in any matter in which jurisdiction is given by this act to the county court, or for stay of proceedings at law to recover any debt provable under a decree for the administration of an estate made by the court to which the application for the order to stay proceedings is made.”

By section 2, “In all such suits or matters the judge of a county court shall, in addition to the powers and authorities now possessed by him, have all the powers and authorities for the purposes of this act, of a judge of the high court of chancery ; and the treasurer, registrar, and high bailiffs shall, in all matters in which the county court has jurisdiction under this act, discharge any duties which an officer * of the court of chancery can dis-

28 & 29
Vict. c. 99.

Jurisdiction in equity to be exercised in county courts in suits by creditors, legatees, or devisees, heirs-at-law or next of kin where the estate to be administered shall not exceed 500l.:

and in proceeding for a stay of suit at law to recover debt provable under an administration decree.

In all suits or matters under this act, the judge and officers of the county courts to have the power and authorities of a judge

and officers
of the
court of
chancery.

charge, either under the court of a judge of such court or the practice thereof, and all officers of the county courts shall in discharging such duties conform to any rules or orders to be framed as hereinafter provided."

Sect. 3. "Any one of the vice chancellors, on the application at chambers of any party to any suit or matter pending under this act, shall have power, then and there, or, if he shall think fit, after hearing a summons served upon the other party or parties, to transfer the same to the court of chancery, upon such terms, if any, as to security for costs or otherwise, as he may think fit."

Power to a
vice chan-
cellor to
order
transfer of
suits from
county
court to
court of
chancery.

City small
debts court
to have
same juris-
diction as a
metropoli-
tan county
court.

Sect. 4 gives to the city small debts court the same jurisdiction as a metropolitan county court.

Power to
the judge
of a county
court to or-
der any
legacy, &c.
to which
an infant
or person
beyond the
seas may
be entitled
to be paid
into the
bank of
England,
in accord-
ance with
provisions
of s. 32 of
36 Geo. 3,
c. 52. (a)

By sect. 5, "Any legacy or sum of money to which any person who is an infant or absent beyond seas may be found or declared entitled by any county court in any suit or matter under this act may be ordered by the court to be paid to the accountant general of the court of chancery, in accordance with the provisions of sect. 32 of the stat. 36 Geo. 3, c. 52; and the person ordered to pay the same shall, within such time as the court shall direct, produce to the registrar of the court the certificate of the accountant general of the payment of such money; and if default be made in such payment the judge may direct a warrant of execution to issue to the high bailiff of the court, who by such warrant shall be empowered to levy or cause to be levied by distress and sale of the goods and chattels of such person a sum of money equal in amount to the sum which he was or-

dered to pay to the said accountant general and to the costs incurred by reason of such default, and the sum so levied shall be paid to and be receivable by the said accountant general under the direction of the court; and all amounts so paid or transferred into the court of chancery, with any dividends thereon, shall be paid or transferred * to the person or persons entitled thereto, or otherwise applied for his or their benefit, on application by summons to one of the vice chancellors while sitting at chambers."

Power to
enforce
judgments

By sect. 8, "For the due execution of any judgment, decree, or order made under the authority of this act, or

(a) See ante, 1407.

of the rules and orders to be framed as hereinafter provided, the court shall have power to order, and the registrar upon such order shall have authority to seal and issue, and the high bailiff to execute, any writ or warrant of possession, writ or warrant of execution, or other process of execution for carrying into effect any judgment, decree, or order of the said court; and such writs, warrants, and processes shall be in the form and executed at the time and in the manner to be set forth in the rules and orders to be framed as hereinafter provided.”

By sect. 9, “If during the progress of any suit or matter it shall be made to appear to the court that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the county courts is hereby limited, it shall not affect the validity of any order or decree already made, but it shall be the duty of the court to direct the said suit or matter to be transferred to the court of chancery, and thereupon the said suit or matter shall proceed in such one of the vice chancellors’ courts as the lord chancellor may by general order direct; and such vice chancellor shall have power to regulate the whole of the procedure in the said suit or matter when so transferred: Provided always, that it shall be lawful for any party to apply to such vice chancellor at chambers for an order authorizing and directing the suit or matter to be carried on and prosecuted in the county court, notwithstanding such excess in the amount of the limit to which jurisdiction in the matter is hereby given to the county courts; and the vice chancellor, if he shall deem it right to summon the other parties or any of them to appear before him for that purpose, after hearing such parties, or on default of the appearance of all or any of them, shall have full power to make such order.”

of county
courts in
equity.

Where
amount of
subject-
matter of
suits ex-
ceeds the
limit of the
jurisdic-
tion of
county
court, suit
may be re-
mitted to
court of
chancery,
&c.

* By sect. 10, with respect to the court in which proceedings in equity shall be taken, it is enacted, “that proceedings for the administration of the assets of a deceased person shall be taken in the county court within the district of which the deceased person had his last place of abode in England, or in which the executors or administrators, or any one of them, shall have their or his place of abode.” “Proceedings in any suit or other matter under this act, which are not otherwise provided for, shall be taken or instituted in the county

In which
of the
county
courts pro-
ceedings
shall be
taken.

court within the district of which the defendants, or any or either of them, shall reside or carry on business."

By sect. 11, "If during the progress of a suit or matter it shall be made to appear to the court that the same could be more conveniently prosecuted in some other county court, it shall be competent for the court to transfer the same to such other county court, and thereupon the suit or matter shall proceed in such other county court."

As to
transfer
of suit
from one
county
court to
another.

By sect. 16, "The county court judges appointed or to be appointed by the lord chancellor from time to time to frame rules and orders for regulating the practice of the courts, and forms of proceeding therein, under stat. 19 & 20 Vict. c. 108, s. 32, shall frame the rules and orders for regulating the practice of the county courts under this act, and forms of proceedings therein, and from time to time amend such rules, orders, and forms; and such rules, orders, and forms, or amended rules, orders, and forms, certified under the hands of such judges or of any three or more of them, shall be submitted to the lord chancellor, who may allow or disallow or alter the same, and so from time to time; and the rules, orders, and forms, or amended rules, orders, and forms, so allowed or altered, shall, from a day to be named by the lord chancellor, be in force in every county court." (b)

Power to
frame rules
and orders
under 19 &
20 Vict.
c. 108.

(b) Orders and rules have been framed by the above mentioned county court judges in pursuance of this section, and have been approved by the lord chancellor. They may be found in the 11 Jur. N. S. 369 *et seq.*, and the same work (p. 367) contains the following abstract of them. The equivalent to a suit in chancery is to be called a plaint in equity, and forms of plaints in the several matters to which the act extends are given, being, in fact, nearly identical with the common form of bills now used in chancery practice. The plaint may be filed by a plaintiff in person, or by his attorney. It is not required to be printed, but as many copies as there are defendants to be brought before the court must be delivered to the registrar. The defendants are to be brought before the court by summons, to be served by the bailiff within seven days, or in the case of

a defendant out of the jurisdiction, within such time and in such manner as the court shall direct. The summons is to be returnable not less than one month, nor more than three months, after the filing of the plaint. If the defendant, before the return day of the summons, signs an admission of the truth of the allegations in the plaint and submits to the judgment of the court, the plaintiff can only claim the costs then already incurred, and the further costs of attending and obtaining the decree or order to be made on such admission. The defendant may, within eight days after the service of the summons, by writing, disclaim any interest, or deny any statement in the plaint, or raise any question of law on the statements in the plaint, without admitting the truth thereof, or aver new matter. With reference to this period of eight days, it is to be observed that the court

* By sect. 17, the said county court judges are to frame a scale of costs and charges to be paid to counsel and attorneys * with respect to all proceedings authorized to be taken by the act.

Scale of costs to be framed by the judges.

By sect. 18, "If any party in a suit or matter under this act shall be dissatisfied with the determination or direction of a judge of a county court on any matter of law or equity, or on the admission or rejection of any evidence, such party may appeal from the same to the vice chancellor authorized as aforesaid, provided that such party shall, within thirty days after such determination or direction, give notice of such appeal to the other party or his attorney, and also deposit with the registrar of the county court the sum of ten pounds as security for the costs of the appeal; and the said court of appeal may make

Parties aggrieved may appeal.

has, under the 17th rule of the 28th order, a general power to enlarge or abridge the prescribed term for taking any step. The defendant may proceed in person, or by attorney. The 3d order contains rules as to evidence, the admission and production of documents. Witnesses are in general to be examined orally, but affidavits may be used, upon notice, if not objected to; and, by order of the court, witnesses within the jurisdiction of another court may be examined by the registrar of such other court. It is unnecessary to state the effect of the provisions with respect to the hearing and decree. When the intervention of a conveyancing counsel is required, the court names the counsel. In taking accounts and making inquiries, the registrar performs the duties and has the powers of a chief clerk. Creditors, after advertisement, are to send in their claims, and any securities held by them, but are not required to attend or prove, unless served with notice so to do; and provision is made for admitting claims after the appointed time. Provisions are made with respect to — absent parties; the registrar's certificate; final decree; revivor and supplement; proceedings under the fifth, sixth, and eighth heads of jurisdiction above mentioned; *ex parte* applications; amendments; affidavits; rehearing, and enforce-

ment of decrees and orders, which need not be abstracted here. The 17th order relates to funds in court; money ordered to be paid into court is to be received by the treasurer, who is to give a receipt for it, and stock, shares, and other securities, directed to be received in court, are to be transferred into the names of the registrar and treasurer. Investments in consols may be ordered in the names of the treasurer and registrar, either alone or jointly, with the name of the person immediately entitled to the interest of the fund. Sums under 30*l.* may be invested in the post office savings bank. Provision is made for a married woman's equity to a settlement out of a fund exceeding 200*l.* or 10*l.* per annum. The 18th order provides for the transfer of the proceedings to the court of chancery, when the value of the subject-matter appears to exceed the prescribed limit. The 19th order regulates appeals. Notice of appeal is not to operate as a stay of proceedings, unless the judge from or the judge to whom the appeal is made shall so direct. The case for the appeal is to be prepared by the appellant, and settled by the judge. The 20th and subsequent orders relate to the duties of the registrar, of the high bailiff, and of receiver, and to minor points of practice.

such final or other decree or order as it shall think fit, and may also make such order with respect to the costs of the said appeal as such court may think proper; and such orders shall be final. Provided, that nothing herein contained shall authorize any party to appeal against any decision of a county court, given upon any question as to * the value of any real or personal property, for the purpose of determining the question of the jurisdiction of the court under this act, nor to appeal against the decision of a county court on the ground that the proceedings might or should have been taken in any other county court." (c)

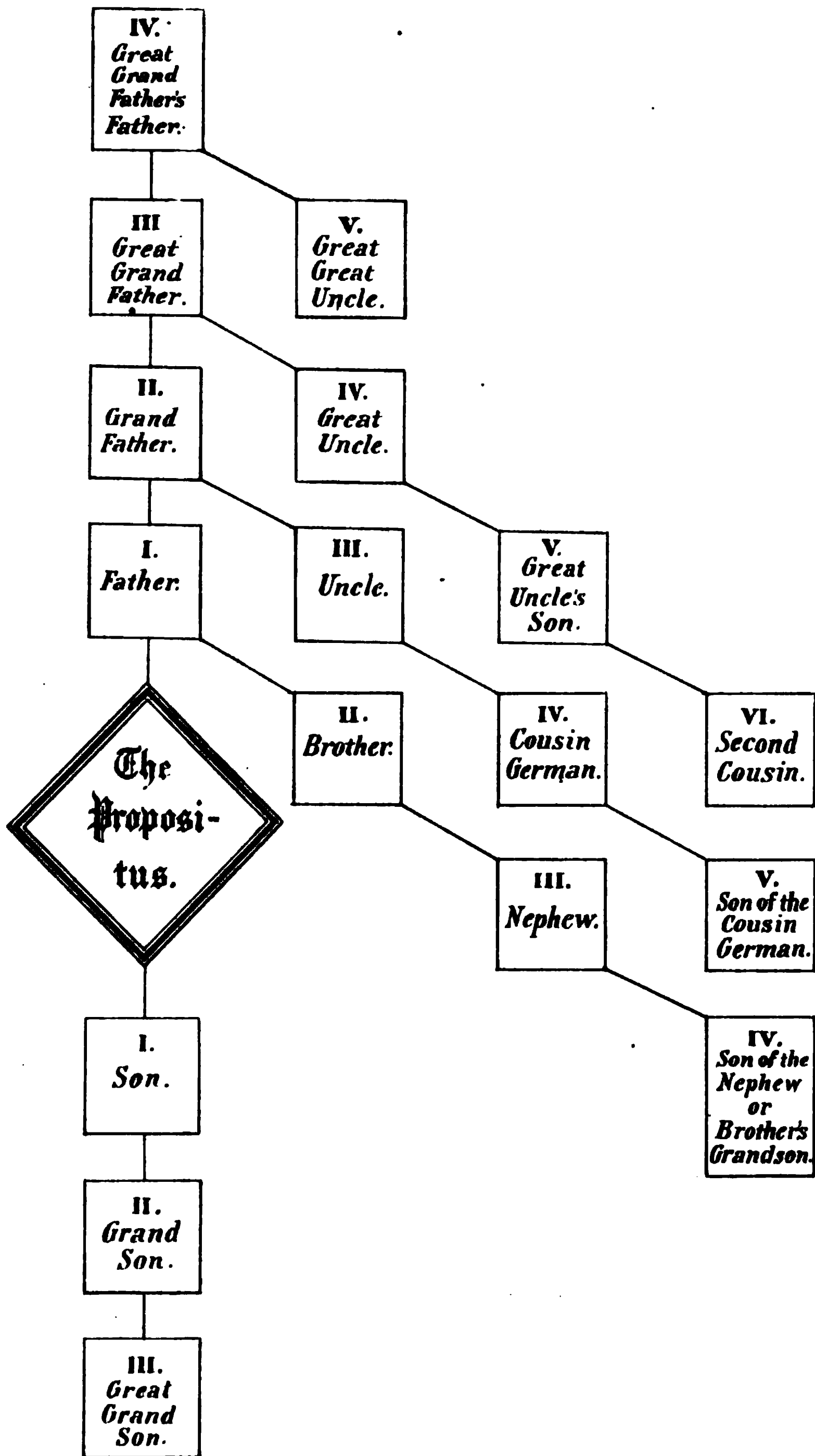
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ment of
act.

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[2069]

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- Page 385 [342], to note (*t*¹), *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Nash v. Hunt*, 116 Mass. 237, 253; *Hardy v. Merrill*, 56 N. H. 227.
- Page 386 [342], to note (*t*¹), *Nash v. Hunt*, 116 Mass. 253, as to the order of proceeding in the trial of issues respecting sanity.
- Page 393 [346], to note (*d*³), *Hardy v. Merrill*, 56 N. H. 227, in which it is held, that persons, who are neither experts, nor attesting witnesses to a will, may testify to their opinions regarding the sanity of the testator when founded upon their knowledge and observation of the testator's appearance and conduct. This important case, which overrules *Boardman v. Woodman*, 47 N. H. 120, and *State v. Pike*, 49 N. H. 399, cited in the above note to the contrary proposition, was not reported until after that part of this work relating to the subject had been printed. The opinion given by Mr. Justice Foster, in *Hardy v. Miller*, challenges attention as a very able review of the authorities and a clear vindication of the rule adopted by the court.
- Page 402 [351], to note (*a*), *Rollwagen v. Rollwagen*, 63 N. Y. 504, 517.
- Page 434 [371], to note (*i*), *Rice v. Harbeson*, 63 N. Y. 493.
- Page 444, 445 [379], to notes (*p*¹), and (*r*), *Newell v. Homer*, 120 Mass. 277, 280.
- Page 446 [380], to note (*x*), *Newell v. Homer*, 120 Mass. 277, 281.
- Page 1018 [951], to note (*h*¹), *Chase v. Davis*, 65 Maine, 102.

